THE

WORKS

OF

JEREMY BENTHAM,

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PRINCIPLES

OF

JUDICIAL PROCEDURE,

WITH THE OUTLINES

OF

A PROCEDURE CODE.



BY

JEREMY BENTHAM.

NOTE BY THE EDITOR.

THE subject of Judicial Procedure was a very favourite one with the Author, and one to which he was continually in the habit of recurring for more than thirty years. The consequence was, an immense mass of MSS. on this subject, extending to several thousands of pages, was found at his decease. Very many of the Chapters were written over and over again, each of them varying in some particulars: and all of them were more or less in an unfinished state. In preparing these MSS for publication, the principal object throughout has been, as far as possible to present the text in the very words of the Author. The arrangement, I am fully aware, is not so logical as it ought to have been, or as it would have been, if the Author had lived to finish the Work. The difficulty was occasioned by this circumstance. In some Chapters, which in strictness ought to have followed others, allusions were made to the contents of those others, as if they were already known to the reader, and therefore they would not have been so readily understood, unless they had been made to follow, without making greater alterations in the text than I felt myself justified in doing. The plan pursued with respect to those Chapters which treated of the same topic, has been to incorporate the separate matter of each into one, and cancel the rest. Although much has been done in this way, and also in cancelling other repetitions, yet I fear some still remain, which should have been omitted. If this be found to be the case, the only apology I can offer is, that in a task of this responsible nature, I considered I should be erring on the safer side by retaining too much, rather than too little.

By far the greater portion of the Work was written between the years 1820 and 1827, both inclusive. Parts of the Introduction and the first Chapter were written so long ago as 1802, and may be distinguished by the style. In order fully to appreciate the merits of the arrangements here proposed, reference must be made to all that concerns the Judicial Establishments and the Minister of Justice, in the Constitutional Code. The Author's great Work on Evidence should also be consulted.

In the Appendix will be seen the commencement of an "Initial Sketch of Procedure," which was written under circumstances somewhat interesting. In the Autumn of 1825, the Author visited Paris for the benefit of his health. On his return, he was detained at Boulogne by a contrary wind for nearly a fortnight, and there at the end of that time this Sketch was written. It was the first thing written by the Author for nearly three months, during which his indisposition continued.

The paper on Account-Taking Judicatories was intended by the Author to be attached to the Procedure Code; although it partly belongs to the Constitutional Code.

Two very instructive communications follow, on judicial matters in the East Indies. One is from Sir Alexander Johnston, the distinguished Chief-Justice of the Island of Ceylon; the other from a highly valued friend of the Author, who is now in India; I have not therefore been able to ask his permission to publish his name.

RICHARD DOANE.

London, 30*th December* 1837.



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PRINCIPLES OF JUDICIAL PROCEDURE,

WITH THE OUTLINES OF A

PROCEDURE CODE.

PREFACE.

Of the present publication, the particular object is the preserving the country from being saddled by institutions, which under the profession, sincere or insincere, of contributing to the formation of an appropriate code of procedure, will have the effect rather of retarding, or even preventing it, and, at the same time, adding to expense, by which no fruit in the shape of benefit will be produced.

A Procedure Code, fit to be invested with the form of law, could not be prepared otherwise than by and with reference to the codes of law, penal and non-penal, to which it has for its object and purpose the giving execution and effect.

The present production, instead of following, precedes both these codes. If applicable in other respects, it will not be found on that account inapplicable to its intended purpose.

With regard to prospect of success, the sense of the public mind may as well be taken by this uncompleted and provisional publication, as by a completed work.

The characteristic features, and fundamental principles — all will be seen brought to view: only in respect of matters of detail, will there be anything to add, to defalcate, or to substitute. As of the plan here proposed, with its supposed features of aptitude, so of the system at present in force, with its supposed features of inaptitude.

On this occasion I shall be found (I hope) to have rendered sufficiently apparent the complete inaptitude of the established system with reference to its professed purpose; and thence the absolute and indispensible necessity of a code, entirely new, from beginning to end. This, supposing it done, will be no small thing done.

What is more, here is much which, in the character of a proposed code, all persons who feel inclined, may take in hand, and take for the subject of consideration and publication; and by this means, towards ultimate success so much advance will have been made.

It might perhaps not be a great deal too much to say of it, that in its present state, it might form a warrant for the appointment of a Committee of the House of Commons, and the consideration of it, the subject-matter of a portion of the labours of such a committee; and while the committee was occupying itself in the requisite labour, on its several points (including what regards the judiciary establishment, which is already in print,) I shall, if alive, be occupied according to the measure of my ability, in making such amendments as I find a demand for.

The reason for this hurrying, is the fear of seeing real improvement obstructed, and even improbabilized, by the creation of new offices, with enormous salaries attached to them.

Let me ask, how many centuries would it take to remove the already generally-acknowledged abuses, at the rate of progress at which the operation has been, and is performing, by the recent statutes?

No objection however to these; in the road to reform, every inch made is better than none.

INTRODUCTION.

By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared, or supposed to be declared, by them in each instance. Laws prescribing the course of procedure have on a former occasion been characterized by the term *adjective* laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *substantive* laws.

For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it.

As in fact every act by which a course of procedure is commenced has for its end or object, the bringing about the execution of some law of the substantive class, so, in point of utility, it may be said that the course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws. For this is not only a use of it, but the only use for it.

The ultimate utility of it will therefore depend altogether upon the utility of the substantive laws, the execution of which is in each instance endeavoured to be brought about: unless the substantive law be conformable to the greatest happiness of the community, the use made of the body of adjective laws on that occasion cannot be conformable to that same end. But though this may with truth be given as the main and primary end of the course of procedure, it cannot however be given as the sole end; because in the pursuit of that same end, a variety of inconveniences are apt to occur, and indeed in a certain degree cannot several of them but occur — in every instance: hence result, as so many collateral or subordinate ends, the avoiding as far as possible the giving birth to those several inconveniences.

The code of procedure, then, is composed of the system or assemblage of adjective laws.

Of the substantive branch of the law, the only defensible object or end in view, is the maximization of the happiness of the greatest number of the members of the community in question.

Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.

The present proposed code is composed of an aggregate of arrangements, having the above for their object, or end in view.

Of every extensive body of law, the end, mainly at least, if not exclusively, in view, has been the greatest happiness of those by whom the body of law in question was made.

Consistently with the nature of man, and the preservation of his species, no other could any extensive body of law have had for its end in view. For proof of this position, see the Constitutional Code.

In a representative Democracy, if rightly constituted, the possessors of the constitutive or supreme authority are the aggregate body of the members fitted for self-government; and the possessors of the legislative authority are their delegates, and would represent their interests.

In the case of an Aristocracy, the interests of the members of the aristocracy, or the majority of them, would prevail; and in the case of a Monarchy, the interest of the monarch.

In a mixed monarchy, composed of the monarch and the aristocracy, it would be the conjunct interest of the monarch and the members of that same aristocracy that is to say, of the majority of those who act on the theatre of legislation.

In the case of a mixed monarchy, composed of the monarch, the aristocracy and the delegates, or say deputies, of the people, the conjunct interests of those same three authorities.

Thus much as to substantive law. But in the case of adjective law, or say procedure law, to a greater or lesser extent the law has had for its authors, in proportions infinitely diversified, legislative authority (in its several modification, and the judicial authority — in a word, the judges, who under the notion of interpreting, where, in fact, there was nothing to be interpreted — have been suffered, in effect, to legislate. The consequence is, that in correspondent proportions, this branch of the law has had for its object, or end in view, the interest of this class of the functionaries concerned in the making of it.

But more especially in the mode in which their remuneration has commonly been allotted to them, is their interest in a state of diametrical opposition to the interest of those for whose benefit the laws are everywhere professed to have been made.

By the author of these pages, no share in that profit was ever aimed at, or desired, nor at present could by possibility be received: his interest is therefore in the state of the greatest possible harmony with what he has made his duty; and accordingly, wheresoever it may have happened to him to have erred, the error will have had a deficiency not in moral, but in active and intellectual aptitude for its cause.

Among the arguments employed, and which, since some recent occurrences, have been made use of, for stopping the progress of improvement (and securing against diminution the addition made every year to the number of those who, by and for the benefit of lawyers, are punished for not knowing what they have been carefully kept under an impossibility of knowing,) one is — You cannot provide for everything; therefore you ought not to provide for anything more than what has been provided for already.

To understand the force and value of this argument — the aptitude, moral and intellectual, of those by whom it has been employed — employ it to other branches of art and science.

Without going out of the field of legislation, apply it to substantive law. Apply it

to medicine: you cannot cure all diseases — why give yourselves so much trouble in the endeavour to cure any more than you can already.

For the enactment, or say establishment, of any law, or of any mass of the matter of law — of two species of power — the intellectual and the political — the concurrence, or say conjunction, is necessary: intellectual, that of the legislative draughtsman; political, that of the legislator. The political cannot, in the most improved state of society, be with propriety in hands other in number than a select few: in the least improved, it has everywhere been of necessity in the hands of a single person.

But before it comes to be presented to the legislative assembly in the legislation chamber, there is another tribunal in which, with great advantage to the public, every question of law which is invested with a certain degree of importance may be introduced — and that is the public-opinion tribunal. For the purpose of introducing into this tribunal a proposed law, the right of initiation appertains at once to every person who can find adequate inducement for giving exercise to it.

In the legislative assembly, proposed laws cannot without confusion be taken into consideration, and compared together, in any considerable numbers. But by the public-opinion tribunal, they may be subjected to this operation, in a number altogether unlimited.

To introduce, or attempt to introduce, into the legislative assembly, a mass of law of a new complexion, before the minds of men were to a certain degree prepared for the reception of it, would be lost labour, and a hopeless task. Not so the like attempt in relation to the public-opinion tribunal.

Why set about drawing up a perfect body of laws — that is to say, one which to yourself you expect will appear so? — why give yourself any such trouble? Suppose the task of drawing it up accomplished, can you seriously expect to see it, in that place, put to use? — can you flatter yourself with any such hopes?

Answer: No. But, to a person who has leisure, and who has the means of living while the work is going on, that consideration is no sufficient reason for declining the task.

In the present instance, the work must of necessity be the work of many years — say six, eight, ten years. Now, suppose it a settled rule that no such work shall be begun to be drawn up till a probability of its being immediately taken into consideration in the legislative assembly (and ultimately adopted) has presented itself, — what is the consequence? Answer: That the necessary time in question — the six, eight, ten years — will be lost: the public for that whole length of time deprived of the receipt and enjoyment of this all-comprehensive instrument of felicity.

Oh! but this is innovation! — Oh yes — unquestionably; it is innovation. But what follows? From misery, whatever be the shape of it, a change to tranquillity is innovation. From war, whencesoever it comes, change to peace is innovation. War, misery, wickedness in every shape — are they then to be perpetuated? — all for fear of innovation?

Whoever takes in hand these pages, will do well, in the first place, to lay out of his mind everything that belongs to the existing system, baptized the *technical*. He will see there, when the time comes, nothing but confusion — a purposely and most elaborately organized system of confusion. Of itself, it accordingly explains nothing: explanation it requires itself throughout, so far from being capable of affording it. In the here proposed system, styled the natural, he will see the course prescribed by common experience and common sense. The purpose being to give execution and effect to a system of arrangements and ordinances, by elicitation made of the truth of facts, the question will always be, whether this or that one of the arrangements made, or supposed made (supposed only in the case of the unwritten law,) has application to the individual case in question.

For arriving at the truth, the natural course, it will be seen, is the same in all cases. Under the technical system, the course pursued is different, according to the various judicatories employed, with their different portions of the field of law (logical or geographical) assigned to them, or occupied by them, with corresponding different sets of powers and duties — common law, equity law, civil law, penal law, ecclesiastical law, admiralty law, general sessions law, petty sessions law, and so on — all differing so widely from one another, while pretending to be directed to one and the same object, — the discovery of truth in regard to facts, by means of evidence. All of them good, it is impossible they should be; all bad, it is altogether possible they should be, and will accordingly be seen to be; all unapt — relation had to such their professed and falsely pretended purpose; all good, — relation had to their non-professed, but disguised, and endeavoured-to-be-concealed, purpose: — viz. the promotion of the particular and sinister interest of the institutors, at the expense and by the sacrifice of, the universal interest.

Of the proposed system, these are the leading features: —

1. Expense of *litiscontestation*, defrayed as far as possible by the public.

2. Cases of necessity excepted, attendance

of parties in their own case, not less universal and punctual than that of third persons in the character of witnesses.

3. With ample precaution against abuse, necessary expense of evidence, and professional assistance, provided by the public, for those who are not themselves in a condition to defray it.

4. For the verity of whatever statement is made on a judicial occasion, or actually or eventually for a judicial purpose, effectual provision will be made, — and that the same in all cases, — by appropriate punishment, and without the intervention of any useless ceremony.

CHAPTER I.

GENERAL VIEW—ENDS OF JUDICATURE.

WHEN the whole body of the Law has for its object the greatest happiness of the greatest number, the whole of the adjective branch taken together may be said to have two specific ends: the one *positive*, maximizing the execution and effect given to the substantive branch; the other *negative*, minimizing the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end.

Between these two pursuits the conflict is all pervading and perpetual. Whatsoever arrangement is taken for the attainment of the one end, it can scarcely avoid being in a greater or less degree obstructive to the attainment of the other end.

If, whether it be with a view to compensation merely, or to compensation and punishment together, measures of adequate strength for securing eventual forthcomingness on the part of the defendant — person and property included — be not taken, injured individuals, who are, or would, or should have been, prosecutors, or say pursuers, remain without redress—without indemnity for the past, or security for the future: if measures of more than adequate strength are taken, evil-doing defendants not only may be made to suffer more than is necessary; but, what is worse, hardship (to an indefinite amount) may be made to fall on the heads of men who have not in any way been evil-doers; and then not only with and by, but even without, any evil consciousness or evil intention on the pursuer's side.

In this way the judicial establishment (how well and faithfully soever the duties of it may be performed) may be made the instrument of oppression, and even of depredation. No intellectual aptitude — no active aptitude — no appropriate knowledge or judgment on the part of the judge — can render him completely secure against so deplorable a result. No otherwise than through the medium of such information as comes in his way, or is obtainable by him, can he ever act, or forbear to act. If that information is false, and by means of its falsity deceptive, a wrong judgment is on his part unavoidable.

On this occasion, as on every other, the grand security of securities is *publicity*:— exposure — the completest exposure of the whole system of procedure—whatever is done by anybody, being done before the eyes of the universal public. By this means, appropriate moral aptitude may be maximized— appropriate intellectual aptitude may be maximized — appropriate active aptitude may be maximized. The greater the tutelary influence exercised over the judge by the public eye, the more intense will be the attention on each occasion bestowed by him, in the endeavour to obtain adequate knowledge, and give maturity and correctness to his judgment, as well as quickness to the exercise given on this occasion to his active faculties.

Still, however, against deception by false assertions and false evidence in other shapes, the soundest judgment can never be secure.

What remains, then, is, to provide what security can, without preponderate hardship be provided against falsity uttered by an individual coming in the character of a pursuer, with the view to subject to a hardship, a defendant on whose part no wrong has had place.

Of the necessity of making arrangements of this sort—of the difficulty that attaches upon the endeavour—no adequate conception can ever have been formed by those whose thoughts have been confined within the bounds of the field, occupied by the arrangements taken with this view in any body of law that has ever been in force. In every such body of law, the expense and vexation, attached without distinction to the operation of legal pursuit in every case, tend with a force proportioned to the aggregate force of the complicated mass of hardship, to the prevention of ungrounded and ill-grounded suits.

Such is its tendency, and such to a prodigious extent is its effect, independently of all intention and desire on the part of those by whom the system was framed, or those by whom application is made of the powers established by it. To the production of this thus far salutary result, not only is no such endeavour or desire necessary, but in spite of their most strenuous endeavours to the contrary, it could not be prevented from taking place.

At the same time, while without, and (to an even universally-indefinite extent) against any such intention, this mass of hardship is in this shape productive of good effects; in another shape it is to an unmeasurable extent productive of evil effects. It is an instru-

ment put into the hands of the oppressor — of every oppressor who is rich and wicked enough to purchase the use of it, at the hands of those who, according to the intention of those by whom it was made, continue to reap the profit — an instrument, by which, under the yoke of one-tenth of the population, nine-tenths are kept in an oppressed state, and but for the salutary, though scarce perceptible influence of the public-opinion tribunal, would be kept in a state of the most abject slavery.

That, on the part of rulers, the evil is everywhere the result — not of oversight, or deficiency in intellectual aptitude, but of purposed intention and endeavour — is matter of demonstration. For everywhere not only are the obstacles in question left in full force, without any endeavour to remove or lessen them, but addition, and to a vast amount, is made to their force — made, too, by instruments of their own manufacture — made by them, with the manifestly-resulting effect, and thence with this unquestionable purpose, namely — the creation of law-taxes and law-fees: law-taxes imposed by the rulers for the increase of their own excessive opulence; law-fees, which in their legislative capacity they suffer their colleagues and instruments to exact for the increase of their own exorbitant wealth, thus amassed by the application of oppression to the purpose of depredation.

Thus, then, the endeavours of the philanthropist in the law may be expressed by this one problem: how to unite the maximization of redress for the injured in the character of pursuers, with the minimization of hardship on the innocent in the character of defendants.

These being the ends, the means may be stated as follows: —

1. In so far as necessary, under the name of security for eventual justiciability, on the plaintiff's side, a condition imposed, to the obtainment of the judicial services for the alleged purpose of seeking redress for injury.

2. In case of an unjust demand, for the prevention of needless and unprofitable vexation and expense (such as might otherwise be imposed on individuals in the situation of defendants, by individuals placing themselves in the situation of plaintiffs,) a provision made, not only of eventual compensation but also of punishment, to be inflicted on those alone in whose instance the existence of blame, in one of two shapes, has been established.

These two shapes are — 1. Evil consciousness; 2. Temerity or rashness.

By evil consciousness, understand, on the part of him by whom a suit is commenced or carried on, a consciousness of the injustice of it — of the non-existence of all adequate ground for it.

By temerity or rashness, understand the absence of that due attention, by which, if bestowed upon the subject, he by whom an unjust suit is commenced would have been rendered conscious of the injustice of it.

By way of punishment, suppose law-taxes enforced against such suitors as have been found to blame. Tax for vexatious pursuit: tax for vexatious defence.

In certain cases, assistance should be rendered at the expense of the public, or of spontaneously-contributing individuals; assistance afforded to persons to whom (whether on the pursuer's or on the defendant's side) the inability to defray the expense of pursuing the necessary means of obtaining justice would otherwise render them destitute of the means.

The sources of such expense are —

Procurement of evidence, in the case where expense is necessarily attached to the elicitation of it: namely, — 1. In the case of oral evidence, the expense of conveyance to and from the abode of the proposed witness to and from the seat of judicature; 2. The expense of demurrage at the seat of judicature; 3. Loss of time, which, to those to whom time is an indispensable source of subsistence, is tantamout to expense; 4. In the case of written evidence, the expense of making the necessary transcripts. There is also the correspondent expense in the case of appeal.

The sources of receipt in all cases are —

1. Voluntary and gratuitous contributions on the part of judicial assessors and others, to whose cognizance the case has happened to make its way.

2. Under the eye of the judge, purchase of assistance for this purpose, by engagement to repay in case of success, together with a premium adequate to the risk.

3. A fund to be provided for this purpose at the expense of the public.

As to *blame*, independently of any which may have had place at the origin of the suit: on the part of the pursuer, in the case of a pursuit accompanied with the consciousness of its groundlessness; on the part of the defendant, a defence under the like consciousness of its groundlessness, — blame may have place on either side; and this as well on the part of him who knows himself to be in the wrong, as on the part of him who, being in the wrong, knows not that he is so. Such will be the case in so far as, on either side of the cause, arrangements are taken, having for their effect (whether they have or have not had for their object) the production of needless vexation or expense on the part of the opposite side.

As to the provision of fine or other punishment for vexatious pursuit or defence, if security in that shape were not provided, observe the evils that would ensue

For the purpose of minimizing vexation and expense, or rather for the purpose of avoiding to create it one fundamental general rule is, exceptions excepted — obligation of personal appearance at the judgment-seat, on the part of all parties as well as witnesses.

Of this arrangement, the necessity to justice, that is to say, to all the necessary ends of justice, will be shown further on. For the purpose of the argument, let it here be previously assumed.

Now, then, observe the consequence.

Every person being compellable to appear at any time, and thus at all times, at the instance of any person or any number of persons appearing in the character of plaintiffs — and no person prevented from appearing in that character, or punishable for the vexation produced as above — the whole life of any person, or of persons in an indefinite number, might be completely occupied by calls to this effect: a tyranny exerciseable over all would thus be put into the hands of all — a tyranny, and of such sort as would have, amongst other effects, that of a licence to commit murder, by cutting off from men, in any number, the means of earning their subsistence.

Of the demand by which commencement is given to a suit, what in every case is the object? Answer: In every case, to give execution and effect to the corresponding portion of the law.

Good. But as many as are the different remedies, and so many as are the different forms and proportions in which they are capable of being applied, and, to suit the individual wrong or individual right in question, require to be applied — how can the same course of procedure, or even any small number of different courses of procedure, be in itself applicable, or be capable of being made applicable to each?

Answer: In this way. What they have in common is this: — For the judge to be able to give execution and effect to the appropriate portion of law involved, whatever it may turn out to be, what is necessary is, — that the means of execution be in his power — at his disposal — in his possession, or at his command. These are the person, reputation, property, and in certain respects, condition in life, of the parties, and in particular of the defendant, together with any such miscellaneous valuable right as it may happen to the party to be in possession of.

But omitting, for shortness, reputation and condition in life, for placing the person and property at the judge's disposal, the means requisite are exactly the same, whatsoever may be the disposition which, by his ultimate terminative decree, he may deem it advisable to make of them. In regard to the person, to keep it in confinement for a single day, or for the whole of life — or, supposing the law to permit it, to substitute death to life. Thus it is, that in the case of the most trifling pecuniary demand, and in the case where the whole property of the defendant — his personal liberty, during the whole of his life, or even his life itself, — is at stake, the means, if not of actual execution, of being in a condition to order and effect actual execution, will be in every case the same.

In regard to these same means of execution, one considerable difference, alas! will be found to have place between the means of execution applying to the case where the remedy required is of the most burthensome kind to the proposed defendant, and that in which it is of the least burthensome kind. The more urgent the need which the party on the pursuer's side may have of the remedy sought by him at the charge of the defendant's side, the greater the need there is of the judge's putting himself in the possession of the physical faculty of applying the appropriate remedy, how burthensome soever to the defendant. But in many cases, the determining to wait till full proof can have been made of the justice of the demand, would be in effect to render the fulfilment of the duty of giving execution and effect to the appropriate portion of substantive law impossible: for, in the meantime, and while the proof was in collection, person and property would be out of the reach of the judge. Thus, in cases of a certain degree of importance, the need of a sort of provisional means of execution, of which in these cases the eventual good has a preponderance over the actual evil.

In regard to the *means of probation*, the coincidence is still more entire. Be the demand what it may — be the appropriate means of execution and effect what they may, the evidence adapted to the purpose of obtaining credence for the alleged matter of fact in question will be the same: the means requisite to be taken for coming at the source of the evidence, and eliciting it from its sources in the best shape, will always be the same.

True it is, that in this case, as in that of giving execution to the law, the proper answer to the question, whether to obtain the alleged evidence, or to leave it unobtained, will depend upon the ratio of the lot of evil to the lot of good — the evil in the shape of delay, vexation, and expense, from the elicitation of the evidence, — and the good from its conduciveness to right decision, in other words, the security it affords against deceit and mendacity, by either of which execution and effect would be prevented from being given to the law.

On this occasion, if of half-a-dozen different sorts of judicatories under the same government, — each of them, for the ascertaining of the truth in relation to one and the same alleged matter of fact, pursues a differ

ent course in relation to evidence, — in the wrong they may be, all of them, and are — in the right, courses more than one there cannot be.

Means of communication, of persons needful with persons needful, and of persons needful with things needful: — be the demand what it may, be the particular mode of execution what it may, be the facts of the case what they may, be the appropriate sources of evidence, and the mode of eliciting it, what they may, — the means best adapted to the purposes of effecting the communication necessary between the persons and things in question cannot in any case be different. As to the question, — will it, in the present case, for the purpose of obtaining the evidence, be worth while to employ the means of communication necessary for that purpose? In this case, as in the former, the balance may in some cases require to be taken in hand, and the good expected from employing the necessary means of communication, weighed against the evil inseparable from the employing them.

CHAPTER II.

ENDS APT AND UNAPT.

By the apt ends of judicature, understand the ends of justice, as per Chapter I.; by the unapt, all other ends.

The powers of judicature are the powers exercised by judges as such — exercised by judges (as to a greater or less proportion) in pursuance of their own will, but everywhere and at all times under the controul of a superior authority: in pure monarchies, that of the monarch — in the English monarchy, that of the monarch with the aristocracy under him, constituting together the parliament.

All power has had everywhere, and at all times, for the end of its exercise, the good, real or supposed, of those by whom it has been exercised.

In the formation of the English system of judicature, the judicial has ever been the active, the ordinarily-operative power; that of the monarch, with the rest of the parliament, the controuling only; the authority always capable of exercising that power, and now and then, but very rarely, actually exercising it.

The formation of English procedure began before parliaments were established.

Of this system, the pretended ends would of course always be (or at least have been, and on inquiry *would* be now) the ends of justice, — the ends of justice as above enumerated: the real end, and if not the sole end, at any rate the main and ultimate end, the good of the judges — of those members of the judicial establishment who have borne their respective parts in the framing of it; — the obtaining and securing for their use the greatest possible portion of the objects of general desire, and in those large masses which none but those amongst whom the powers of government are shared can possibly possess. These may be styled the sweets of government: power, wealth, factitious dignity; ease, at the expense of official duty, and vengeance at the expense of justice.

Hence then another, but not inconsistent account of the ends of judicature, is this: maximization of depredation and oppression. Of depredation, wealth is the fruit: of power, oppression and vengeance.

The only end of the English system that is ever brought to view, is — the keeping up the customs commenced in the darkest ages.

In every political community as yet in existence, widely different from the only proper, have been as yet the actual ends of judicature.

Judicature is a branch of government; the judicial system of the aggregate official establishment.

In every political state, the actual ends of government have been the maximization of the happiness of the aggregate of the persons bearing respectively a part in the exercise of the powers of government.

Proportioned to the share possessed by the judges (and their associates in the profession out of which they spring) in the powers of government, has been, in every political state, the degree in which their interests have been promoted, in and by the arrangements of law, at the expense of all rival interests. In pure and absolute monarchies, the men of law, of whom the judges formed a part, having neither power nor influence but what they derived from the monarch, have found themselves under the necessity of taking for the main object of their labours, the sinister interest of the monarch: and it is but by stealth, and in virtue of, and in proportion to, his ignorance or carelessness, that they have been able to introduce any arrangements favourable to their own sinister interest, at the expense of his.

Very different has their situation in this respect always been, in England. The grand instrument of despotism, a standing army, not having sprung up in England till a system of government, suited to the purpose of the judges and other lawyers had been formed by lawyers, the monarch, in the measures taken for the advancement of his own sinister interests, felt himself under the necessity of letting in their sinister interest for a considerable share of the benefit. Other hands, still more obsequious, could he have found them, would of course have been employed by him in preference; but no such

hands did the nature of the case afford. In the field of law, covered as it was by a jungle of their own planting, none but themselves could find means to move. Awed by parliaments, which though *in esse* as unfrequently, and for as short a time as the craving rapacity of the monarch could contrive, were continually *in posse*, it was only by an obscure and tedious road that the judges could make their way in the prosecution of their designs: while, by fresh power and fresh sources of profit, as occasion offered, thrown into his hands, these ever-dependent creatures of his were ministering to his rapacity, he through ignorance or indolence connived all the while at theirs. While by fines and confiscations they were filling his coffers, by fees or addition to salary he connived at the rapacity practised by them for their own benefit.

This object, however, they found it beyond their power to accomplish, without a variety of false pretences. Lies accordingly were the instruments, by which on every occasion the dirty part of their work was done: and in such numbers, and of so gross a texture, were lies of rapacity uttered by them, that in the career of rapine and mendacity, all the most profligate of their brethren of the trade in other countries were left far behind.

In the accomplishment of their object, thus were they obliged to proceed in a retail way, and by short steps; taking money no otherwise than by the offer made of their services to the parties,—in the shape of fees; and these fees, considering the poverty of the greatest part of the contributors, separately taken, unavoidably small ones. At one time indeed they had formed higher projects: instead of picking it up by driblets in the shape of fees, they had begun to work for themselves as they had been used to do for the monarch, and confiscated whole estates at once to their own use, as they had been in the habit of doing to his. This being in a reign of remarkable weakness (that of Henry the Sixth,) it was by this weakness that they were probably emboldened to make so daring an experiment. The experiment was accordingly made. But though made with impunity, it was not made with success. A parliament there was, which, however impotent and disinclined with relation to any considerable good, was still willing and able to save its members and others from having their estates swallowed up in the gulph which had been thus dug for them.

Contrasted with the beheadings and embowellings, which in the hands of these same functionaries had been ordered for crimes of so much lighter a die, it is curious enough to observe the gentleness of the means employed by the parliament in its opposition to this project: a simple prohibition, and that clothed in the softest language.

In this way it was, that in England the *actual* ends of judicature became, as they are and as they continue to be, so widely different from the *proper* ends of judicature.

In regard to the number of suits, what the proper ends require is, that the number of sincere suits, and applications that are not rash, be maximized; that of insincere suits and applications minimized.

That the number of those that, not being rash, are sincere, be maximized — Why? Because on the part of every person, who in his own opinion, and that of his circle, has a right to a judicial service from a judge, and by the state of the laws finds himself precluded from the obtaining the effect of it, a feeling of oppressedness — an opinion of injustice on the part of the system of judicature — has place.

The number of those that are insincere, minimized — Why? Because if, in the opinion even of him who would institute them, they are unjust, and by reason of the vexation produced by them on the part of the defendant, oppressive, — so everybody else may safely stand assured they are.

In regard to rash suits that are not insincere: as to the number of these also, what the ends of justice require is, that they be lessened. Why? Because by those also vexation is produced. But for the lessening the number of these, arrangements of a nature so severe as those which may and should be employed for the lessening the number of the insincere, should not be employed; lest along with those which are sincere yet rash, those which are sincere and not rash be repressed, and thus the opinion of injustice and insecurity in a correspondent degree diffused. What in this case the ends of justice require is, that maximization be given to the number of those rash suits, in which the burthen of vexation is definitively (by means of compensation) taken off the shoulders of the party in the first instance vexed, and set down upon those of the vexer — the author of the vexation: for, in proportion as these conjoined effects are produced, the quantity of vexation is reduced on the part of the injured class, and with it the extent of the apprehension of the like injustice.

Now as to what, in relation to this subject, is required by the *actual* ends of judicature — required with more or less energy and effect, in every as yet known system of judicature, but with most of all by the English.

In regard to the number of suits, that the number of lawyer-profit-yielding suits, sincere and insincere, be maximized: of that of profitless suits, minimized.

That the number of lawyers'-profit-yielding suits be maximized — Why? Because, — but as to the cause, the case speaks for itself — lawyers' labours and lawyers' profits proportionable.

That the number of profitless suits be minimized — Why? Because, for every such suit, there would be lawyers' labour (of such as were employed,) and no lawyers' profit to weeten it.

The lawyers (whose only profit, if any, came from the parties, and could not be compelled to serve the parties) would of course, if the inducement were taken away, leave their books, and escape from the service. Of judges, if paid by the public (and on condition of not receiving anything from the parties,) their interest and inclination would of course prompt them to wish, that of suits thus barren the number should be minimized; but they could not, as the hireling lawyers could, so far as regarded suits in which, if instituted, they would have been concerned, reduce it to nothing.

By law-taxes, profitless suits are reduced, but lawyers'-profit-yielding suits, in a certain proportion, reduced with them. By law-fees, profitless suits are reduced, though lawyer-profit-yielding suits are also reduced; yet in so far as limits are set to rapacity by prudence, the balance on the profit side is increased.

In England, not to speak of other countries, not only at no time has the system of procedure acted upon been in fact directed to the ends of justice, but at no time, by any person concerned in the carrying it on, has any such profession as that of its being directed to the ends of justice been ever made.

With what face, indeed, could they have been, by any English lawyer, laid down as the exclusively proper ones, or so much as simply the proper ones, seeing that the ends uniformly pursued by English judges (who, with here and there the exception of a scrap or two of legislative-made law, have been at the same time their own legislators) are in a state of perpetual opposition to the ends of justice?

Hence it is, that from beginning to end, an English book of procedure *(book of practice* is the name of such a book among English lawyers) presents no other object than a system of absurdity directed to no imaginable good end.

An all-comprehensive code of substantive law, having for its end in view (in so far as the ruling one, and the sub-ruling few, can be brought to admit of it) the greatest happiness of the greatest number, each part of it present, to the minds of all persons on whose conformity to its enactments its attainment of such its end depends: — an all-comprehensive code of adjective law, otherwise called a code of judicial procedure, having, for its end in view the giving, to the utmost possible amount, execution and effect to the enactments of the substantive code: — such is the description of the instruments which the people (in so far as apprised of their most important interests) look for, at the hands of the government: — such are the securities which in a government, in the breasts of the members of which any regard for the greatest happiness of the greatest number had place, would lose no time in bringing into existence.

Such are the indispensable instruments of felicity and security, which the implacable enemies of both — the lawyer tribe, under all its diversifications — will leave no stone unturned to prevent from coming into existence: the *actually existing*, indiscriminate defenders of right and wrong in one house — the *quondum* indiscriminate defenders of right and wrong, now exalted into exclusive defenders of wrong in another house.

It is a maxim with a certain class of reformists, not to give existence or support to any plan of reform, without the consent and guidance of those to whose particular and sinister interest it is in the strongest degree adverse; not to do away or to diminish any evil, but by the consent, and under the guidance of those by whom, for their own advantage, it has been created and preserved.

From this maxim, if consistently acted upon, some practical results, not unworthy of observation, would follow: —

For settling the terms of a code having for its object the prevention of smuggling in all its branches, — sole proper referees, a committee, or bench of twelve smugglers.

For a nocturnal-housebreaking-preventive code, — a committee of twelve nocturnal housebreakers.

For a highway-robbery-preventive code — a committee of highway robbers.

For a pocket-picking-preventive code, (in the physical sense of the word pocket-picking,) — a committee of unlicensed pickpockets.

For a swindling-preventive-code, or say an obtainment-on-false-pretences-preventive code, — a committee of swindlers called swindlers, or of swindlers called Masters in Chancery, including the Master of the Rolls; or a committee, bench, board, or jury — no matter which the appellation, so the apostolic number, twelve, be retained, composed *de medietate;* half of swindlers unlicensed, and unentrusted with the power of extortion — the other half licensed, and invested with the power of extortion, the *jus extorquendi*, the *jus nocendi*, in its most irresistible and profitable shape.

For a female-chastity-securing code, — a committee of twelve ladies-procuresses.

No housebreaker has an interest in preventing the abolition of housebreaking, no highwayman in preventing the abolition of highway robbery, no pickpocket in preventing the abolition of pocket-picking, no sinecurist or Master in Chancery, or other swindler, in preventing the abolition of the practice of obtaining money by false pretences, no lady-

procuress in preventing the abolition of female unchastity: — no such practitioner, male or female, stands engaged to resist the abolition or curtailment of his or her means of livelihood, by any interest comparable in point of magnitude and intensity with that which an English judge has in preserving the rule of action from any change from which human misery would be lessened, and his own profit, which with so much ingenuity and success has been so intimately and inseparably interwoven with it, and rendered proportionable to it, reduced.

The Westminster-Hall common-law judges, in different groupes — in some instances collectively, in others severally — (shared among them as they can agree,) possess and exercise a power of making law — of making that which has the bad effect, without any of the good effect of law, *ad libitum*, without any controul but that of a legislature, which is in league with them by a community of sinister interest, and leaves to them the charge of exercising depredation and oppression, in cases in which fear or shame would prevent its operating to that effect by its own hands.

Lord Tenterden dismisses unpunished (indeed, how could he have done otherwise?) an extortioner, with whom he has a fellow feeling, with whom he is in partnership, whose profit is his profit. This fact has been held up to the view of Mr. Peel, and Mr. Peel will do nothing without the advice and consent of Lord Tenterden, whose wisdom, magnanimity, disinterestedness, and public spirit, he can never sufficiently admire.

Upon the money which, — instead of being secured to and divided between the distressed debtor and his frequently no less distressed creditor, the gaoler (dignified with the title of Marshal) of the prison called the King's Bench prison, — this gaoler can contrive to squeeze into his own pocket, depends the value of the place to the possessor, and thence to the patron, the Chief-justice of the said King's Bench.

Into the mind of a Member not in office, suppose any such conception to have found entrance, as that the money of a debtor would be more beneficially disposed of, if divided amongst his creditors, than if divided between the Marshal and the Chief-justice of the King's Bench, — and to move for leave to bring in a bill for this purpose — what, in such a case, would be the course taken by Mr. Peel? He would cause it to be understood, that if the bill were entrusted to him he would take charge of it: a proposition, of the advantageousness of which it would not be possible for the member, be he who he may, not to be persuaded. The bill is now in Mr. Peel's hands. What, then, if he acts with any consistency, will he do with it? He will recommend it to the care of Mr. Jones* and Lord Tenterden, and will be guided altogether by their invaluable assistance and advice.

A man, indicted for manslaughter by driving a load over the body of the deceased, was acquitted. Why? because he did not do the act? No: but because by Mr. Nobody-knows-who, who drew the indictment, the condition of the *cavalry*, in respect of sex, and aptitude for marriage (nomenclature is in this instance an operation of the most perilous delicacy,) had been averred; and by those who should have proved it, had not been proved. By the care of Mr. Peel's sublaborators, in one of his bills, a clause had been inserted, by which the necessity of the averment in question, and proof made of it, would have been saved. But by the wisdom of a majority of those wise men of the West, it had been perceived, that by the omission of matter so indispensable in the eyes of the common law, "*too great a laxity in pleading would have been introduced.*"

One reason had been alleged why the defendant, if a murderer, should not suffer as such: and the reason was, that by the drawer of the indictment, the nature of the road had not, in point of law, been explained, — whether it was a king's highway, or what else it was. This objection, formidable as it was, was overruled by the learned judge, Lord Chief-justice Best; whose liberality and sense of justice stood thus conspicuously manifested.

But the objection about the condition of the cavalry was too material and too strong, even for his Herculean shoulders. This objection was pronounced by him a fatal one: to have found it obviated by a clause in an act of Mr. Peel's, had been his hope; but alas! on inspection, the clause was not be found.

Thus it is, that by the deliberate, and so recently declared judgment — that judgment a unanimous one, of the twelve Wise Men of the West — it is conclusively established, that (not to speak of other functionaries of the law) the power of granting effectual pardon to all criminals — murderers in particular, not excepted — belongs incontestibly to every person by whom the function of penning the instrument of accusation is performed.

With this licence, wanting to himself is every murderer, who, by his murders or otherwise, having provided himself with the money, omits to offer to the draughtsman whatever sum may be requisite, to the insertion of the mercy-administering surplusage: wanting to himself, disrespectful to the luminaries of the law — the twelve judges — is the draughtsman by whom so advantageous an offer is refused. What danger for him can there be, from the acceptance of it? So many of these omis-

* The late Marshal of the King's Bench prison.

sions as there have been in time past, none of them producing any suspicion of sinister design: so easy, so frequent, such omissions *without* sinister design, —who shall be uncharitable enough to pronounce intentionality in any future instance, whatever it be?

By the functionary in question, true it is, that in consequence of the omission, a good sum of money, say a thousand pounds, has been received.

But from thence does it follow that it was really his intention that guilt should escape? Forbid it, candour!—forbid it, justice! The judges, are they not ministers of justice? This draughtsman, is he not a minister of justice likewise?

Let but a man be the minister of justice, and whatsoever be the quantity or quality of the mischief, in the production of which he is instrumental, — whatsoever be the quantity of the money which he gains by its being produced, — (in such sort, that were not the mischief produced, the money would not be received:) it is not to be supposed that it was his intention that mischief should be produced; it is not to be supposed that, whatsoever be the money gained by producing it, he will ever intentionally contribute to the production of it in future.

Captain Macheath, when, pistol in hand, he said to the passenger, "Give me your purse or you are a dead man," and he received the purse with five guineas in it accordingly, — was it his intention to receive the money, and convert it to his own use? Yes: for his style and title was Captain Macheath. But suppose his style and title had been Mr. Justice Macheath —or suppose, that after having been convicted of the robbery, instead of the gallows he had been raised to the bench, — would he, even in the last case, have been guilty? — would it have been his intention either to have received the money, or to have shot the passenger, in the case of his not receiving it? Oh no: the patent of appointment would have *relation backwards:* nothing more easy, nothing more conformable to precedent. The King can do no wrong upon the throne. The King's judge can do no wrong upon the King's Bench — can he, Lord Tenterden? — can he, protector and partner of the tipstaff?

CHAPTER III.

PROCEDURE — ITS RELATION TO THE REST OF THE LAW.

A PROCEDURE CODE is an accessory code, which, as we have seen, has for its end in view, and occupation, the giving execution and effect to a correspondent principal code.

Hence comes a natural supposition: the substantive code should, as mathematicians say, be given, or the adjective can have no meaning; the substantive being throughout a necessary object of reference.

To a certain extent and degree, this is correct and undeniable. To a certain extent it does not apply. If it did apply to its whole extent, this work would, from first to last, be unintelligible and useless.

The procedure code, in so far as it is clear it ought to be, has for its purpose, and end, and occupation, two things: the exercising, for the avowed purposes mentioned in the substantive code, powers of all sorts over persons and things; and, in the next place, coming at the truth of the case in regard to matters of fact, to wit, such matters of fact as are necessary to give warrant and justification to the exercise of those same powers — say means of execution and means of proof, or, in one word, evidence. Of these two desiderata, the first mentioned is the first in the order of design, and in the order of importance. But in practice, that which is to constitute the warrant, must precede the operation for which it is to afford the warrant.

Here, then, comes the line of distinction— the distinction between that part of the proposed system of procedure, which may be given without the previous exhibition of any part of the system of substantive law, and that part which cannot. The means for coming at the truth, as to matters of fact, are the same in all cases: the means for obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases.

But of this general application of machinery, different ordinances of substantive law require the application of different engines or instruments to be brought into exercise. On which occasion, which instrument shall be brought into exercise, and how applied— this will depend upon the particular portion or article of substantive law, to which, for the purpose of giving effect to it, application is to be made of it.

Taking possession of a man's body, for the purpose of securing, on his part, compliance with ordinances — ordinances of the substantive law, and thence, those of adjective law employed in giving effect to them. This power, once possessed, is in its nature, applicable to any one purpose as well as any other: to the exaction of service in any shape — to the infliction of punishment in any shape.

So in regard to taking possession of a mass of property: to the above purpose is added, in this case, the allotment of it, in kind or in value, in satisfaction of debts due.

So in regard to the means of communication — of communication between person and person — of communication between persons and things, whether for the purpose of exe-

cution, or the purpose of proof — the catalogue of these will require to be a perfect one.

In a word, on looking over the titles of the several chapters of this work, it will be seen, that the points therein respectively brought to view, require all of them to be settled for every extensive substantive code that can be imagined.

But different judicial services — judicial service in different shapes — require so many different operations to be performed, for the application of the general apparatus of powers to their several particular purposes. Different modes of punishment require so many different operations, or sets of operations, to be performed in the application of the general powers over person, property, reputation, and condition in life — to be applied to the purpose of inflicting the particular species of suffering allotted to each species of offence. These, then, must all be *given*, ere the Procedure Code can be complete.

In the present outline, that which can be done, and accordingly is done, is the bringing to view the course which it is supposed is the best that can be pursued, for the purpose of giving execution and effect to the whole system of substantive law — execution and effect down to that stage in which the execution in each instance (in the instance of each service, and in the instance of each punishment) is actually to be done; the *tenor* of the definitive decree must be accommodated and adapted to the particular service — to the particular punishment.

On this occasion will be seen one broad feature, by which the here proposed code will be seen to stand distinguished from all codes that ever were established. If the one course here chalked out be the straight one, all those others will be recognized to be composed of aberrations, exhibiting variety of absurdity, and to the unhappy people productive of variety of wretchedness.

Another corollary, of which a general intimation may here be given, is the comparative smallness of the diversity between the course of procedure required for the giving execution and effect to the non-penal branch of substantive law, and the course requisite in the case of the penal branch. For giving appropriate execution and effect to the non-penal branch, appropriate proof must be obtained and employed, and appropriate means of execution provided and applied; and with little if any difference, these will serve as well for penal as for non-penal cases.

In the penal cases of the greatest severity, reluctance as to compliance on the part of the defendant will be greater than in any non-penal case: and for surmounting reluctance, adequate provision, so far as the nature of the case admits, must in every case be made. The reluctance will be as the affliction. But in cases decidedly non-penal, the affliction may, with little exception, be as great as any which, in the far greater number of penal cases, it will be found necessary to produce. Be a man's property ever so vast, it is frequently, for a purely non-penal purpose — satisfaction to creditors — necessary to divest him of it; and many a man, rather than undergo this affliction, has doomed himself to, and actually suffered, imprisonment for life — for life, and that a very long one.

As to the aberrations — those aberrations by which the course of procedure has been rendered a course of such afflictive intricacy — they will be found all springing from one source, — the opposition of the actual ends of judicature to the ends of justice — the opposition between the interests of those by whose will that course has been regulated, and the interest of the people whose destiny has been disposed of by it.

By this one circumstance, every anomaly will be seen to be accounted for — every object rendered plain and clear: without it, every object will be obscure — the whole system will continue to present to view the same chaos as at present.

Doubtless, without a continual eye to the mass of substantive law in all its branches, no such outline of the course of procedure as the present could have been delineated: but in regard to the objects which it was necessary should be kept in view by the writer, it was not necessary that they should be presented to the view of the reader.

In a case of civil procedure, the previous existence of any offence is not supposed: what is supposed is the existence of a right on the part of some individual to apply to a court of justice, requesting the court to confer on him another correspondent right; but by conferring on the individual so applying the right so applied for, it can do no otherwise than create, on the part of some other individual, a correspondent obligation or mass of obligations: if the individual on whom the obligation in question is thus sought to be imposed, submits voluntarily to have it imposed on him, there is no lawsuit in the case: so, likewise, if without inquiring to know whether he is willing to receive it, the judge imposes it upon him of course.

But if the case be such that the judge, before he proceeds to impose the obligation so required to be imposed, causes application to be made to the party in question, to know whether he be content to have it imposed upon him, and upon such application so made to him, he refuses to submit to have it imposed on him, unless upon further order to be pronounced by the judge (upon hearing the reasons for and against the imposition of the obligation thus contended against) — in such case, a cause, suit, or litigation takes place,

and such cause, suit, or litigation, is termed a civil one. In this case, as in the case of a penal one, an offence is still supposed as liable to be committed: nor without the idea of delinquency can this case any more than the other be understood; for in this case a judgment, with an order thereupon grounded, is supposed, in the event of the plaintiff's gaining his cause, to be issued by the judge. But to the idea of a judicial order, the idea of an act of delinquency is necessarily annexed; for the order has no force, if any act performed in breach of such order be not considered and treated as an offence.

Both an act by which a penal suit is commenced, and an act by which a civil suit is commenced, suppose an act of delinquency or offence: the difference is, that the acts by which a penal suit is commenced, suppose an offence committed already; whereas an act by which a civil suit is commenced, does not suppose any offence committed already—does not suppose any offence as being about to be committed for certain: it supposes only that an offence will eventually be committed, if, upon the judge's having created, as above, the obligation corresponding to the right required to be conferred, any act in breach of such obligation should come to be committed.

We proceed to the consideration of the several ends of procedure considered in respect of the penal branch of it. The ultimate ends of penal procedure are two. Of these, the main and positive end is the infliction of the punishment in question, including the administering of the several species of satisfaction attached to the lot of punishment in question, in the cases where mixed species of satisfaction respectively have place. The negative ultimate end is the non-infliction of the lot of punishment in question in each case, as the individual in question, in the event of his not having committed or been a partaker in the alleged individual offence, is entitled to have this protection of the innocent.

Collateral or incidental ends of penal procedure: the avoidance, as far as is possible, of the several inconveniences which, in a greater or less degree, are inseparable from the course of action by which a penal suit, action, or prosecution, as it is called, is carried on. These inconveniences, considered in respect of their origin, may be termed by one general or common appellation, juridical or legal vexation.

Of juridical vexations, the principal modifications may be enumerated as follows:—

1*st*, Consumption of time, understood in a way supposed to be unpleasant.

2*d*, Confinement in respect of place; obligation of being in some place in which it is unpleasant or prejudicial to a man to be; obligation of not being in some place in which it would be pleasant or advantageous to a man to be.

3*d*, Pecuniary expense, loss, or charge.

4*th*, Anxiety of mind, a pain grounded on the apprehension of being subjected to one or more of the modifications of inconvenience above mentioned. Of these several modifications of forensic vexation, the pecuniary expense is the most prominent; and this partly because the existence of it, in a degree worth regarding, is capable of being more precisely ascertained than in any of these other cases; partly because the amount of it is capable of being more exactly measured.

These inconveniences, or some of them, have a mutual tendency to increase and generate each other: confinement in respect of place will oftentimes be productive of pecuniary expense; pecuniary expense, or the apprehension of it, will be productive of confinement in respect of place, viz. in as far as, for the purpose of saving the expense, a man either stays at home, instead of going a journey, or goes a journey, instead of staying at home as he would have done otherwise.

The avoidance of delay is termed an end of the second order; because delay itself, though indisputably an inconvenience, is not in its effects distinguishable from the inconveniences of the first order—the inconveniences to which the several ends of the first order respectively bear reference; for into one or other of these same inconveniences it may in every case be resolved.

In speaking of delay, it must all along be understood, that to the business of the branch of procedure in question, as to every other business, a certain portion of time is altogether necessary; by delay, therefore, neither more nor less is understood than the consumption of any portion of time over and above the portion of time absolutely necessary—the portion of time that would be sufficient for the accomplishment of the several ends of procedure in their respective greatest degrees of perfection, whatever it may be.

So far as the delay continues, so far the main positive ultimate ends of procedure remain unaccomplished.

From delay, again, in certain cases, may arise a result contrary to the negative ultimate end of procedure; in other words, from delay may arise the conviction, and thence the punishment, of the non-guilty; as for example, by the deperition of evidence necessary to the proof of innocence.

From delay may arise forensic vexation in any of its already enumerated shapes.

The avoidance of precipitation may be ranked as an end of the second order, for the same reasons that apply to the case of delay. But the mass of inconvenience of which it is liable to be productive, is upon the whole even less considerable, or at least less diversified. In the case of delay there is a certain inconvenience; for so long as it lasts,

there is a denial of justice: in the case of precipitation, there is no inconvenience, but what, in the first instance, is contingent. The inconveniences appertaining to precipitation are no other than the disaccomplishment or frustration of one or other of the two ultimate ends of procedure; in other words, they can scarcely consist of anything else but either the non-conviction of some one who is guilty, or the conviction of, and consequent punishment of, some one who is not guilty. Supposing it to be productive of either of these ultimate inconveniences, precipitation can scarcely be productive of any one of the collateral or incidental inconveniences, viz. local confinement and expense, unpleasant occupation, anxiety of mind: on the contrary, the effect of it is to reduce these several collateral inconveniences to a quantity inferior to that in which they would exist otherwise. In this point of view, so far from being productive of inconvenience, it is productive of advantage — an advantage which would be clear and desirable upon the whole, were it not for the chance of danger of which precipitation is productive, viz. the danger of giving birth to one or other of the two above-mentioned ultimate inconveniences — the inconveniences corresponding respectively to the two ultimate ends of this branch of procedure.

The idea of precipitation may be thus fixed and explained. A certain quantity of time is supposed to be necessary to give room for the several actions and reflections, on the part of the several individuals concerned, which are considered as necessary to afford to the judge the best chance for rendering justice; *i. e.* for the accomplishment of the two ultimate ends of procedure above mentioned.

Precipitation is considered as taking place, when in any part, anything is supposed to be struck off or defalcated, from the supposed necessary length of time. Thus, if a cause be supposed to be of that importance, that after the hearing of all the proofs, a less time than a week cannot, it is supposed, be sufficient, on the part of the judge, to be employed in the consideration of them, and the time employed by the judge in the consideration of them is no more than a single day; in such cases the judge must, by the supposition, be deemed chargeable with precipitation. If, then, in consequence of such supposed precipitation, the judgment actually given by the judge is repugnant to one or other of the ultimate ends of justice, in this case the mischief correspondent to such ultimate end is actually produced. But in the opposite case, *i. e.* if the decision of the judge be conformable to the ultimate ends of justice, no mischief at all is produced by precipitation: the contingency is not reduced to act; on the contrary, so far from being productive of inconvenience, the supposed precipitation is productive of advantage upon the whole, since by virtue of it as much time as corresponds to the delay thus saved, is saved.

Thus, again, if the time allowed by the judge for the appearance of a witness is but three days, and the time, which a person whose opinion is supposed to be the standard, would fix upon as necessary for the purpose, is *four* days, the judge would of course, in the opinion of such persons, stand chargeable with precipitation. If, then, the witness accordingly, for want of sufficient time, fail in making his appearance within the time in question, and for want of his appearance an unjust decision is given by the judge — a decision, contrary to one or other of the two ultimate ends of justice; — in such case, the contingent inconvenience attached to the supposed precipitation, is converted into a real one. But if, notwithstanding the supposed precipitation, the witness does make his appearance within the time, and that without any forensic vexation produced, on the part of him or anybody else (for example, without injury to his health, or to the value of his time, or increase of expense,) — in such case, the supposed precipitation turns out to be no real precipitation, or at least not to be productive of any ultimate inconvenience, nor of any prejudice to any of the ends of justice. On the contrary, the consequence, and only consequence of it, consists in a real and positive convenience, since a portion of delay, to the amount of a day, is saved.

However, even on this supposition, a certain degree of inconvenience may be produced by the precipitation, upon the whole. Since the idea of a judge, whose conduct is marked in general with precipitation, cannot but be productive of a general alarm, for want of the requisite measure of delay and consideration: each person conceiving himself liable to appear in the character of a suitor, will become apprehensive of seeing the ends of justice contravened to his prejudice: he will be apprehensive lest, if he become an accuser, the party whom he accuses be, for want of due consideration on the part of the judge, acquitted, though guilty; lest in the event of his coming under accusation, he may, for like want of consideration on the part of the judge, be convicted.

If the enumeration, made as above, of the several objects to be aimed at in the character of the ends of procedure, is proper as far as it goes, and complete, the several ends will furnish so many *principles*, by which the propriety of every regulation, proposed in the character of a regulation of procedure, may be tried.

Should any consideration present itself, which, serving in the character of a reason to evince the utility of the provision to which

it is thus applied, shall at the same time appear incapable of being ranked under any of the above principles: in other words, though good in itself, *i. e.* serving to evince the utility of the provision in some other respect, it should be found not to be of a nature to evince the subserviency of the provision in question to any one of the above ends; — in such case, the enumeration of these ends — the enumeration of the correspondent principles — will in so far turn out to be incomplete; on the contrary, if no such independent reason be to be found, it follows that in this single chapter is contained a test by which the propriety of every imaginable provision of procedure may be tried and determined. And in that case, the pains taken in the investigation of them, and in exhibiting the nature of their relation to each other, will not have been ill bestowed.

This catalogue of ends, is it correct and complete, and the relation between the several articles accurately made out and established? The foundations of the rationale of procedure are then laid, and laid for ever. A standard is constructed, by which the propriety of every rule and disposition of law, in this behalf, that has anywhere been established, or can ever come to be proposed, may be tried and determined. A rule of established practice, established anywhere, in this behalf, is it defective in any respect, or supposed to be defective? It must be in respect of its tendency to produce some of the inconveniences corresponding to the above ends. A rule — is it proposed anywhere, as promising to occupy a useful place in the code of procedure? Its utility, if it possesses any, must consist in the tendency it has to be subservient, in some distinct and assignable way or other, to the attainment of one or more of those ends; to the prevention or diminution, in some way or other, of some one article or articles in the corresponding list of inconveniences.

A system of procedure, with what skill soever directed, will be liable, notwithstanding, to give birth to a variety of mischiefs, or say inconveniences. These mischiefs, various as they are, will however be found all of them reducible to the following heads: —

In the penal branch,

1. Impunity of delinquents.
2. Undue punishment, viz. punishment of non-delinquents, or punishment of delinquents otherwise than due.

In the non-penal branch,

3. Frustration of well-grounded claims.
4. Allowance of ill-grounded claims.
5. Expense.
6. Vexation.
7. Delay.
8. Precipitation.
9. Complication.

So many mischiefs as are liable to be found in a system of procedure, so many mischiefs to be avoided in every such system: so many mischiefs, the avoidance of which may in any such system be considered as respectively constituting so many ends to be kept in view.

If the catalogue of these mischiefs be complete, no provision that can be proposed can be entitled to a place in any such system, but in so far as it can be shown to be conducive to the attainment of one or more of these several ends.

If, at the same time, it is seen to be more conducive to one of these ends, than to another or others, to which it is sure to be repugnant, a comparative estimate will then be to be made; and for the purpose of this estimate, one point to be ascertained will be the comparative importance of the end or ends on both sides, *i. e.* of the mischiefs concerned on both sides; in the next place, the degree of conduciveness on the part of the provision in question with reference to each such end.

In casting an eye over the catalogue of these mischiefs, some may be observed, the avoidance of which — the complete avoidance — is, in conception at least, a possible result: to this head may be referred the four first articles, and the eighth, — impunity of delinquents — undue punishment — frustration of well-grounded claims — allowance of ill-grounded claims, and precipitation. Others there are, of which not even in conception can the exclusion appear possible: to this head belong the articles of expense, vexation, delay, and complication. Of these, it will be seen immediately, that to a certain degree they are inseparably and essentially attached to the business of procedure: in these instances, the object is not to exclude them altogether, that being plainly impossible, but on each occasion to reduce their respective degrees or quantities to minimum, to the lowest pitch possible.

In looking over the same list again in another point of view, another remark that may be made is, that in some of the instances the result thus given as mischievous is mischievous in its own nature. To this head belong, evidently enough, the first six articles — impunity of delinquents, undue punishment, frustration of well-grounded claims, allowance of ill-grounded claims, expense and vexation. In other instances, the result, though still indubitably mischievous, can hardly be said to be so in itself; it would not be so, were it not for the property it has of giving birth, or its tendency at least to give birth, to some one or more of the articles in the list last mentioned: to this head belong the other remaining articles — delay, precipitation, and complication.

Among the mischiefs of the first order, two, and two only, are such, that the ends corresponding to them can be said with propriety to constitute the direct and ultimate ends of the system of procedure. These are, in the

penal branch, impunity of delinquency: in the non-penal branch, frustration of well-grounded claims. In the penal branch, the avoiding to administer punishment when undue, is certainly an end of very high importance, and altogether neeessary to be attended to with unremitting and anxious care. It cannot, however, with any propriety, be stated as constituting an ultimate, a primary, a direct end of the system of procedure. Why? Because if there were no system of procedure at all, this end would be but the more completely and effectually accomplished.

This same observation may, it is equally evident, be extended with equal propriety to four other of the above ends — to that which consists in avoiding to give allowance to ill grounded claims, and to those which respectively consist in avoiding to give birth to those unhappily inseparable accompaniments of every system of procedure, viz. expense, and vexation in other shapes.

The two ultimate ends — avoidance to produce or suffer impunity on the part of delinquents — avoidance to produce or suffer frustration of well-grounded claims; — these two ends, though thus for the sake of unity, symmetry, and analogy, expressed in a negative form of words — in a phrase of a negative construction — are capable of being expressed more naturally and perspicuously by a phrase in the positive form: accomplishment of the punishment of delinquency — effectuation of well-grounded claims.

In the penal branch, the application of punishment, with its attendant masses of satisfaction in the case where the offence imputed has really been committed; the avoiding the employment of such coercive measures in every case where the offence has not been committed: in the civil branch, the collation of the right demanded, in the case where the collation of it is required by a correspondent provision of the substantive law—the collation of such right, and therewith and thereby, the creation of the correspondent group of obligations; the avoiding the employing those same coercive measures, in the case where the creation of the correspondent right is not required by the substantive law: —

All these measures, both in the penal branch and in the civil, the observance of all these conditions, is comprised in one expression, viz. *rendering justice*—taking that course in every case which coincides with the track marked out beforehand by the finger of the substantive law.

It being established, that the proper end and object of the system of procedure is to render justice as above explained,—the justice that will naturally be understood as that, the rendering of which is the end or object thus spoken of — is the real justice of the case: meaning by real justice, that which is such in contradistinction to whatever else may appear to be such — in other words, as before, that the course taken shall be what really is conformable to the indication given by the correspondent portion of substantive law, in contradistinction to what, if there be a difference, is in appearance, and but in appearance, thus conformable.

The distinction thus made wears the appearance of subtlety, and even useless subtlety; but when applied to practice, it will, besides being explained, be shown to be, in more points of view than one, of very considerable importance.

It will be seen, in the first place, that between real or abstract justice, and apparent justice, there is in many cases a very palpable difference: in the next place, that when they fail of coinciding, it is rather apparent justice, than real and abstract justice, that is the direct end, and immediately important object of the system of procedure.

In another work,* I have already had occasion to hold up to view, as a distinction of cardinal importance, the distinction between mischief of the first order and mischief of the second order; and so in like manner of good, in so far as that result is among the effects of the action in question, instead of evil as before. But it is only good or evil of the first order that constitutes the effect produced by *real* justice: the good and evil of the second order depends wholly and solely (speaking of immediate dependence) upon *apparent* justice. If the decision given, being a decision by which a man is subjected to punishment, be conformable to apparent justice, — in other words, if the universal persuasion, the persuasion entertained by everybody to whose notice this case presents itself, is that the man was guilty, — in such case, though by the supposition the decision is contrary to real justice, and though, in virtue of the suffering of the party punished, mischief of the first order is produced, yet the mischief remains barren; no mischief of the second order, or alarm, is, by the very supposition, produced by it.

Suppose, on the other hand, the party accused is really guilty of the offence: a decision is given, pronouncing him so, and he suffers accordingly: the decision is in this case, by the very supposition, conformable to real justice. But if it be unconformable to apparent justice, in other words, if according to universal persuasion the man is looked upon as not guilty, a mischief of the second order is produced — an alarm; and that alarm by the supposition is as strong as if the party, thus looked upon as innocent, had been so in reality.

In the same way, *mutatis mutandis*, the distinction between real and apparent justice may be applied in the non-penal branch of procedure. The distinction being thus ex-

* Principles of Morals and Legislation. See Vol I. p. 69, *et seq.*

plained, it remains now to bring to view, by way of example, a case, or a few cases, in which it is realized, and from thence to show, (what however will appear pretty clearly without much showing,) the importance and utility of this distinction in practice.

When, having been prosecuted, a man who in the general estimation of the public appears to have been guilty, is acquitted; by the observation of such acquittal,—by such impunity as in that case is said to be manifested by it, a mischief of the second order, an alarm at any rate, is produced.

A general apprehension is entertained of similar manifestations of delinquency, and similar mischiefs, as the probable result of such similar offences. Offences are apprehended, in the first place, from the agency of the individual himself, thus triumphing in impunity, and encouraged to go on in the path of guilt by the experienced receipt of the profit of the offence, clear of the punishment endeavoured by the substantive law to be attached to it: offences of the like description, or indeed in a greater or less degree of all descriptions, on the part of other individuals — of all individuals who, standing exposed to temptation, may by the observation of the impunity enjoyed in the instance in question, be disposed to yield to it. Such are the evil effects which, in a greater or less degree, take place, as often as a man who, in the general opinion of the public, appears to have been guilty, is observed to have escaped punishment.

If the case were such, that as well in the case of guilt, as in the case of innocence, reality and appearance always went together; — in that case, no such spectacle of impunity could by the supposition ever be exhibited. But in fact, this want of coincidence between real and apparent justice is observed to take place in but too many instances.

On this occasion, the repugnance admits of two evils, both equally conceivable. One is, that the party appearing in the eye of public opinion guilty, shall notwithstanding, at the conclusion of the suit, have been treated by the judge as innocent, in a manner unconformable to justice; in other words, shall have been acquitted.

The other is, that the party appearing in the eye of the public innocent, shall notwithstanding have been treated by the judge as guilty; in other words, shall have been convicted in a manner unconformable to justice.

Of these two cases, the former is a case that, as will be seen, is but too frequently realized. A variety of causes, each of them adequate to the production of the effect, and accordingly each of them very frequently producing it, will be mentioned further on.

The other is a case which, though not absolutely without example, is happily, there is reason to think, very seldom realized.

In regard to impunity, that the case of a man who, though guilty, and as such prosecuted, has notwithstanding been acquitted, is a frequent one, no person whatever — no judge, no advocate, no person, how partial soever in his affection to the established system, will ever attempt to deny: the utmost that any such person could ever think of affirming, and even this is more than persons so situated will in general be disposed to affirm, is — that when a man has thus been treated as innocent, and as such acquitted, he has accordingly been innocent in reality; and that the decision, though apparently unconformable to the disposition of the substantive law, was in reality conformable to it — that the decision, though not conformable to apparent justice, was conformable to real justice. The argument thus supposed, would very seldom indeed be found conformable to the fact; but what is material to the present purpose is, that even though it were conformable to the fact, it would not be sufficient for the justification of the system of procedure, in which the contrariety in question were manifested. That a system of procedure be good — that it be well adapted to its proper end, it is not sufficient that the decisions rendered in virtue of it be conformable to real justice; it is necessary that they should be conformable to apparent justice: to produce real justice, the only true way is to produce that which shall in the eye of public opinion be apparent justice. In point of utility, apparent justice is everything; real justice, abstractedly from apparent justice, is a useless abstraction, not worth pursuing, and supposing it contrary to apparent justice, such as ought not to be pursued.

From apparent justice flow all the good effects of justice — from real justice, if different from apparent, none.

On the other hand, in this same distinction may be observed a circumstance which operates in some degree as a remedy to a great deal of injustice — injustice which will be seen to be no less entitled to the appellation of real, than apparent injustice. In some cases, in some countries, it will happen, from causes that will be elsewhere mentioned, that although particular instances of injustice, at once real and apparent, are manifesting themselves every day, yet, from the operation of these causes, a considerable degree of confidence will notwithstanding be entertained in the system of procedure, as having a general tendency to produce, in the decisions given under it, a conformity to the prescriptions of justice. In this case, the opinion, though erroneous, and founded on prejudices capable of being pointed out, will, in the way above spoken of, be productive of salutary effects. Were the system viewed in its genuine colours, the alarm produced by it — the alarm of inse-

curity—would be extreme and universal. But by the effect of this prejudice the alarm is lessened; the mischiefs resulting from the imperfection of the system cannot, be the prejudice ever so strong, escape wholly from observation, but the mischiefs, instead of being ascribed to their real cause, the imperfections of the system of procedure, are ascribed to the nature of things. That justice very frequently fails of being done, is a truth too palpable to be disputed—too palpable to pass unobserved, or unacknowledged; but the notion is, that whenever it can be done, it is done; that if in any case it fails of being done, it is because in that case, in the nature of things, it cannot be done. The confidence in the system remains in a manner entire—as entire as if its title to that confidence were ever so real and indisputable.

CHAPTER IV.

JUDICIARY ESTABLISHMENT.

THE arrangements in this proposed Procedure Code bear reference to a correspondent judiciary establishment, without which, execution and effect could not be given to them.

For the list of arrangements proposed for the establishment of it, see the Chapters in the Constitutional Code, from XII. to XXVII. inclusive.

Of the leading features of the system of arrangements, the following summary intimation may in this place, notwithstanding the scantiness of it, be not altogether without its use.

Exceptions excepted, and those few and narrow, and for special causes:—

1. Number of judges in a judicatory, in no instance more than one. Judicatories, each of them single seated. Principle, in one word, the principle of single-seatedness.

2. To the cognizance of every judicatory belong all sorts of cases, or say suits. Principle, in one word, the principle of omnicompetence.

3. From every judicatory, in every case, appeal lies, to one other judicatory, and no more. The judicatory appealed from, the immediate judicature: judicatory appealed to, the appellate judicatory.

4. Attached to every judicatory are—1. A registrar; 2. A government advocate; 3. An eleemosynary advocate: the eleemosynary advocate, for support to the interests of the otherwise helpless, among suitors.

5. Presiding each over a certain number of immediate judicatories, are appellate judicatories: the number, such as the experience of the need manifested of their service, shall have indicated.

In federal commonwealths and countries in which the population is thin, distance great, and means of communication comparatively rare, it may be of use that they be scattered over the country; and where sub-legislatures have place, for every sub-legislature, and in the town which is the seat of it, there should be an appellate judicatory: and thus, by the efflux of suitors to the judicatory, and of members and other functionaries of the legislature, a good public, filled with appropriate aptitude—moral, intellectual, and active—may in each of these seats of business be created and preserved.

But in England, on the contrary, where the communication is so prompt, and the occasions and means so abundant, the demand for a number of appellate judicatories in so many places distant from each other, seems hardly to have place. The metropolis, the immediate centre of all business, which at all times will be sure to afford a public, with the aptitude of which no other town can bear comparison, may serve for all of them.

6. To every judge belongs the power of locating deputes, permanent and occasional, in number to which no present limits can be assigned. To the judge-principal belongs a salary in possession: to each judge-depute permanent, the office of judge-principal, with the salary annexed to it in prospect. By this means, the quantity of judge-power, using the term in the same sense as in the cases of clerk-power and horse-power, will be at all times in sufficiency, at no time in excess. A man will not accept the appointment of judge-depute, in the case where the number of persons already in that situation reduces the prospect of succession to a quantity too small to produce the desire. A judge-depute is as it were an apprentice to his principal, learning his trade in the course of his service.

7. As to the office of judge, so as to the several offices of registrar, government advocate, and eleemosynary advocate, is the power of deputation as above allotted.

8. When time has given room for judge-deputes in sufficient numbers (each with sufficient length of service) to come into existence, no person will be capable of being located as a judge-principal, who has not, for a certain number of years, officiated as judge-depute.

9. At the same time, no person who has ever acted in the capacity of professional lawyer, will be capable of being located in the situation of judge.

10. In every judicatory, to serve as a check upon arbitrary power in the situation of judge, care will be taken to secure the presence of a good public, or say committee of the public-opinion tribunal. Elementary classes, and individuals entering into the composition of this committee, are these:—

(1.) Suitors waiting for the calling on of their respective suits.

(2.) Probationary lawyers, serving in this

seat of judicature a quasi-clerkship, or apprenticeship, — duration of it five years, — during the two last of which, they are admitted to advocate the suits of helpless litigants, or would-be litigants rendered helpless by non-possession of the money necessary to the defraying of the expense.

(3.) The government advocate.

(4.) The eleemosynary advocate, *i. e.* the advocate appointed by government to give assistance on the side of litigants, and would-be litigants rendered helpless by relative indigence as above.

(5.) The quasi-jury, on the occasion of quasi-jury hearings.

11. The elementary functions, necessarily exercised on the occasion of every judicial inquiry, are — 1. The auditive; 2. The inspective; and, 3. The lective.

12. The *helpless litigants' fund*, or fund for defraying the expense necessary to effect the forthcomingness of such evidence as the suit may happen to furnish: a fund partly composed of fines, or say mulcts, inflicted for pursuits accompanied with temerity or evil consciousness.

CHAPTER V.

PROCEDURE — ITS SUBJECT-MATTERS.

As in the case of substantive law (constitutional law, penal law, and non-penal law included,) so here, in the case of procedure law, the subject-matters of legislation are distinguished into —

1. Persons.
2. Things immoveable.
3. Things moveable.
4. Money.
5. Occurrences.

Persons are distinguishable, for the purpose of the procedure code, into functionaries, and non-functionaries.

Functionaries into judicial functionaries, or non-judicial, or say extra-judicial functionaries. For a list of these functionaries, see Constitutional Code, Chap. XII. Judiciary collectively.

As to things immoveable, and their distinctions, see Constitutional Code, Chapter IX. Ministers collectively, § 7, Statistic function.

So, as to things moveable.

So, as to money.

So, as to occurrences.

Occurrences may be distinguished into judicial-procedure-affecting, and miscellaneous.

As to the judicial-procedure-affecting occurrences, they will be found comprisible under one or other of the four heads following: —

1. States of things.
2. Actions, or say operations, at large.
3. Actions, or operations, consisting in the utterance of judicial formularies.
4. Judicial formularies, or say instruments.

By a judicial formulary, or instrument, understand a written or quasi-written discourse, uttered on a judicial occasion, and for a judicial purpose, by some person or persons belonging to the list as above, of actors in the judicial drama, or on the judicial theatre.

In the case of each such actor, distinguishable in respect of the occasions as they occur in the course of the judicial drama, — will be the instruments which may come to be uttered by them as above.

Commenced, in every case, will be the judicial transaction, by some person acting in the character of an applicant, and not by the judge.

Exceptions excepted, on no occasion can the judge, as such, give commencement to any judicial proceeding. For exceptions, see Constitutional Code, Chapter XII. Judiciary collectively, § , Sedative function.

For purposes other than that of giving commencement to a suit, may judicial application be made to a judge.

So many species of applications, so many species of applicants.

Persons to whom written judicial instruments emanate from a judge, are either — 1. Functionaries; 2. Non-functionaries.

Functionaries are, as above, either — 1. Non-judicial; or, 2. Judicial.

Judicial functionaries are, with reference to a judge of the grade in question, either of the same grade, or of a different grade: if of a different grade, they are either of a superior or an inferior grade. Co-ordinates are those of the same grade; super-ordinates, those of a superior grade: subordinates those of an inferior grade. Subordinate to every judge are all non-functionaries.

On a special occasion, for a special purpose, a functionary who, in ordinary, or say in general, is, with reference to the judge in question, super-ordinate, may be subordinate.

Addressed to a subordinate functionary, or non-functionary, a written instrument, expressive of the discourse of a judge, is a mandate, a judicial mandate.

To the nature of the judicial mandate addressed to him, will be referable the nature of the response, if any, transmitted or addressed to the judge, in compliance with, or in consequence of it.

The persons to whom, in consequence of a judicial application made to the judge, judicial mandates are addressed, will be determined by the course taken by the application; and where the application is terminated in (and gives commencement to, and is thereby converted into) a suit, by the course taken by the suit.

The course taken by a suit is composed of, or say marked out by, the several operations, successively or simultaneously performed by the several actors, at so many successive times, posterior to the commencement of a suit.

The applicant, for whatsoever purpose applying, will, as above, have made his appearance without mandate, or judicial instrument of any other kind, received from the judge.

His examination for the day finished, the judge will either dismiss the application altogether, or continue it.

CHAPTER VI.

ALL-COMPREHENSIVE ARRANGEMENTS.

§ 1. *General Division.*

ON no occasion can it fail to be matter of satisfaction to the mind, to feel that it has within its grasp the whole of the subject-matter which it has taken for consideration. But on every such occasion, a movement necessary to this purpose is the occupation of the universal vantage ground, by ascending to the summit of the porphyrian tree. To endeavour to communicate to the mind of the reader this pleasurable sensation, is the business of the present chapter.

Expressed at length, judicial procedure is the subject of the present work. This being premised and understood, procedure alone is the denomination which, for brevity's sake, will in future be employed.

On every occasion, procedure has alike for its object the giving execution and effect to this or that article of the substantive branch of the law.

On every occasion, the substantive branch of law has for its objects one or other of two results: giving effect to some right, or applying the appropriate remedy to some wrong. Correspondent to these two objects of the substantive branch of law, are the two species of processes, called suits, in adjective law. Correspondent to effectuation of rights, is a simply requisitive suit. Correspondent to application of remedies to wrongs, are inculpative suits.

Judicial procedure is an aggregate of connected actions, exercised by divers actors; the first of which has, or professes to have, for its object, or say end in view, the giving on some individual occasion, for some individual purpose, execution and effect to some determinate portion or portions of the substantive code, or say branch, of law.

Procedure may be divided into—1. Operations; 2. Instruments; 3. Stages.

Operations are—1. Application; 2. Probation; 3. Security finding; 4. Counter-probation; 5. Execution.

Applications are either contestational or non-contestational. The contestational are suits. Suits are simply requisitive or inculpative.

The *instruments* of procedure are — 1. Personal; 2. Real; 3. Written. Personal, the functionaries. Real, the judiciary apparatus. (See Constitutional Code.) Written, the contents of the Register.

Stages are — 1. Original inquiry; 2. Quasi Jury inquiry; 3. Appellate inquiry.

§ 2. *Operations.*

Operators and operations. On this occasion, as on every other, be the end what it may, to one or other of these two heads will be found reducible whatsoever, in the relation and character of a *means*, is contributing to the compassing, or say accomplishing or fulfilling of it. Operator, the real entity; operation, the fictitious, emanating as it were from the real entity.

The idea attached to the word operation is a modification of the idea designated by the word action, as that is of the idea attached to the word motion.

Instead of the word *operators*, a convenience will be found in the use made of the word *instruments*. And though the existence of the real entity, *an operator*, is precedent, where it is not concomitant to the quasi-existence of the fictitious entity designated by the word *operation*, — yet for developing the idea designated on this occasion by the word *operation*, and bringing to view the several sorts of actions, it was found to claim, by an indisputable title, the precedence.

In the instrument called *language*, or say *discourse*, at any rate in all the generally known modifications of it, note on this occasion an imperfection, the inconvenient effects of which will be continually exemplifying themselves: the want of two different appellations for the designation, — one of the act, or say the operation — the other, of the result, whatever it be, of that same act or operation. The consequence is, the necessity of employing, for the designation of two ideas so widely different, one and the same word. Unfortunate indeed is the existence of this imperfection.

It pervades and fills with perplexity the whole texture of the language. Every word that terminates in *tion*, and many of them that terminate in *ment* (both derived from the Latin, and common to the Italian, French, Spanish, and Portuguese, as well as the English,) is infected with it.

Application is the act of a party — the party-pursuer — requiring execution, execution and effect, to be given to some article of the body of the law.

Execution, when ordered, is the act of the judge, rendering the service required at his hands by the suitor.

Probation is the act of the suitor, necessary to give warrant and authority for the service so demanded at the hands of the judge.

Execution requires to be distinguished and divided into ultimate and provisional.

Probation requires in like manner to be distinguished and divided into provisional and definitive: and that on the part as well of defendant as pursuer.

Of provisional execution, the need is accidental only, not general and constant. It consists in the doing that for a time, and in such sort, as to be eventually undone should the case be found not to require the performance of *definitive* execution: of which provisional execution, the performance is no otherwise consistently with justice performable, than as necessary to secure the eventual performance of definitive execution, should the case be found to require it.

By *accommodation*, understand that operation which is performed as often as a person, who is not a party to the suit, steps in and lends his assistance to a party on either side, for the purpose of saving him from an injustice, or hardship coupled with injustice, to which he might otherwise be subjected, in the course of the operations necessary to the prosecution of his pursuit or defence.

In so doing, the person by whom the accommodation is afforded, to one or other of the parties at least, and perhaps to both, subjects himself of necessity to one essential, and frequently to several distinct and contingent hardships: no other person is admissible for the purpose of liberating a party, on the one or the other side of the suit, from an otherwise inevitable present disadvantage.

Thus, in actual English technical practice, the two persons who, under the aggregate appellation of bail, are admitted to render to a party defendant the service which consists in causing him to be liberated from an imprisonment of indefinite duration, to which the rigour of the course of procedure would otherwise subject him, are not admitted to the performance of this beneficial service but upon condition of either eventually re-consigning him to that afflictive situation, or discharging in favour of the pursuer the obligation, to subject him to which, was the object of the suit.

Subject to these conditions, the initiatory allegation has, to the purpose of warranting provisional execution (so shaped as not to be productive of irreparable damage,) the effect of probation, provisional probation. But, for the purpose of rendering the provisional execution definitive, it requires to be subjected to the controul of any such counter-evidence as may be adduced by the defendant, together with evidence, probative of facts, if any such there be, the tendency of which is, to do away with and render of no effect any facts to which it has happened to be sufficiently established by the evidence advanced on the pursuer's side.

Intimate is the connexion between all these several operations: necessary are all of them but one, to wit, auxiliary bondsmanship, to the due termination of every suit, on the pursuer's side.

In two opposite orders, they are capable of being brought to view: — 1. The order in which they are contemplated; 2. The order in which they are performed.

In the order in which they are contemplated, they stand thus: — 1. Application 2. Execution (execution being the only object to which the application is immediately directed;) 3. Probation, having for its object the engaging the judge to take measures for eventual execution.

Probation commences with application. Abhorrent to natural procedure is the distinction between allegation, or information, and evidence. In technical procedure alone — in that system alone which had for its object the generation of lies, for the purpose of maximizing the number of groundless suits and defences, — could any such distinction have originated. So many instances in which admission and effect is given to allegation, which, for the purpose of being punishable in case of mendacity, is not considered as evidence, so many instances in which admission and effect, and thereby allowance and encouragement, is given to mendacity. Innumerable are those instances: not a suit that does not commence with one of them; and of the endless chain of them, the first links are occupied in depriving of liberty any man at the pleasure of any other, by whom the faculty of exercising oppression in this shape is ready to be purchased of the judge at the established price.

§ 3. *Instruments.*

Correspondent to operations are instruments. For every operation there must be an operator. If by a single action the operation is performed, there is no room for an instrument. Associated with the word operator, is the idea of an intelligent being; with the word instrument, that of a non-intelligent being: if, then, the appellative instrument is applied in speaking of a person, it must be in an improper and figurative sense; but to save words, using the word in this figurative sense will, notwithstanding its impropriety, be frequently found a matter of convenience.

Of the above-mentioned operations, the system called procedure has been found composed: to one or other of these heads, every operation performed in the course of it will be found reducible; for every one of those operations, therefore, there will be found instruments.

Beings being either persons or things, hence

we have personal instruments and real instruments. But portions of discourse in a written form, partake of the nature of those two subject-matters of consideration and operation: being the discourse of persons communicated by a sort of things, and the use of them being so extended and so continual, — hence the need of speaking of a third sort of instruments, to wit, *written;* within the import of which must be understood to be comprehended *quasi-written,* for the purpose of those which, though not exactly of the nature of written signs, are nevertheless employed sometimes in the production of the effect.

Personal instruments are sub-operators — instruments in the hands of a super-operator; *prehensors,* for example, in the hands of the judge.

1. Correspondent to application — the operation — the fictitious, is applicant the operator, the real entity.

2. Correspondent to probation — the operation — the fictitious, is probator, the really existing entity. *Probator* is accordingly the term presented by analogy. Unfortunately, the idea it presents is too ample — it is that of the success of the operation termed probation; whereas little less frequently is the one followed by non-success than by success. To keep clear of misrepresentation, to the office here brought to view, another term, by which nothing is decided as to success, must be found: instead of *probator,* say then *evidence-holder* — an appellation unfortunately two-worded, for a single-worded one could not be found.

Instruments of *application.* Personal instruments are the applicants. Applicants may be either principal, or *auxiliary*—lending their assistance to the principal: and will be either professional or gratuitous. Thus on the occasion of every judicial application, whatsoever may be the object. So, in particular, on the occasion of that sort of application, to which it happens to be converted into a suit.

Real instruments of application, none.

Written instruments of application are any such portions of discourse in a written form, as it has happened to the application to give existence to.

Instruments of *probation* are personal, real, or written. Personal instruments of probation are persons, considered either in the character of narrating witnesses, or as possessors of sources of real or of written evidence. In all three cases, there will be an advantage in speaking of them by the common appellation of evidence-holders; holden in the breast, until it is uttered, is the evidence of the narrating witness.

Narrating is the epithet applied to one species of witness, to distinguish him from a very different sort of witness (though the two characters are so frequently, as it is always desirable that they should be, in one person,) a percipient witness. In the breast of the percipient witness is the source of the information — the organ of the narrating witness is the channel through which it is communicated to the judge. Turbid are the ideas of lawyers under technical procedure; correspondently scanty, and in proportion inadequate, their vocabulary. Obvious at once, and necessary, is the distinction between the percipient and the narrating witness. Never till in this work, or those which have emanated from the same source, have words been employed in giving expression to it.

Yet how important is this distinction! — Small, indeed, it will be seen, is the probative force of the narrating witness, who has *not* been a percipient witness, in comparison of that of him who *has.*

Probative force — not even that term did the technical vocabulary contain in it. Yet, without it, in what way or by what discourse can you express that which there will be found such continually-recurring need to express.

Yet another distinction. For giving expression to it, say — litigant witness, or non-litigant witness: and as synonymous to non-litigant witness, say upon occasion, extraneous witness. In every modification of the technical system, of the testimony — the narrative of a party litigant, has more or less use been made; yet in none of them has he been spoken of in the character of a witness: on the contrary, between the character of a party and that of a witness, the existence of a sort of incompatibility has been tacitly assumed.

Yet in domestic procedure — in that procedure which, being coeval with the origin of the species, was in existence and use before the technical system existed, even in imagination — seldom is a narrator to be found, who is not either himself a litigant witness, or imbued with the same affection, and liable to be turned aside from the path of truth, by the same biases.

And oh what inconsistency — what twistings and turnings, when of one and the same party litigant the testimony is admitted in some cases, excluded in other cases — in some cases rigorously exacted, in other cases left optional! And from the commencement of the reign of technical procedure to the present time, how enormous must have been the mass of that injustice, of which this exclusion, and the unilateral, and thence partial, admissions deduced from this source, must have been productive! For these exclusions, coupled with these admissions, had there been any ground in reason, human society antecedently to the institution of the technical system, could not have continued its existence. But of this hereafter.

Accommodators. Novel as it is, as a substitute to the long-winded and many-worded appellation — the person by whom accommodation is afforded to another — this, or some other universal appellation, must of necessity be employed. Necessity warrants the appellation—practice will, ere long, familiarize the import of it.

A work of beneficence is, on every occasion, the work of the accommodator; of benevolence generally, and thence presumably; of beneficence constantly and unquestionably. Beneficent accommodator, is therefore a denomination by which, without impropriety in any shape, the *accommodator* might be designated. But for as much as there cannot exist an accommodator who is not beneficent, the word beneficent is not necessary, and after this explanation may be spared.

Correspondent in some sort, though very imperfectly and inadequately, to execution, is *executioner*. In a sense co-extensive with that of execution — in the phrase *giving execution and effect*, it is spoilt for use, by the association it has contracted with the idea of an operator exclusively employed in giving execution to a mandate of penal law, productive of an effect in the highest degree afflictive. For by the word executioner, when presented by itself, will be presented the idea of a functionary employed in giving termination to life, in the person of a defendant in the suit.

Another conjugate of the word execution, and, like executioner, the name of the really existing entity, is *executor*. But for use, as applied to the present purpose, this denomination is also spoilt: executor being the denomination given to the species of trustee, to whom, by the will of a person deceased, the disposal of his property, reckoning from the time of his decease, has been intrusted.

In case of need, for the designation of the person employed in giving execution and effect to a portion of law, the term *executant* may perhaps be found employable.

Correspondent to communication is *communicator*. Unfortunately, this word labours under the same imperfection, as the word probator has been seen labouring under. Included in the idea presented by it, is that of the effect endeavoured at, as being actually produced. The appellation on this occasion needed, is one by which a person employed in making, or endeavouring to make, communication of the subject-matter in question, shall be designated.

In case of need, as the word executant, so the word *communicant*, both of them related by analogy to the word applicant, may perhaps be found employable.

Correspondent to recordation is recordator — for shortness, termed recorder: correspondent to the synonymous appellation registration, is registrar. In this case there is no difficulty, no difference between endeavour and performance. He who records not anything is not a recorder: he who records anything is a recorder, be the recorded matter ever so little, or ever so much: and so in regard to the registrar.

§ 4. *Judication.*

Before any application can be made, there must be in existence an authority, to which at any time it can be made. This authority is that of the judge, sitting in that which has been called the judicial theatre. Of the several classes of persons who are as it were actors on that theatre — of their several functions and duties, a description has been given in the Constitutional Code, Chapters from XII. to XXIX. inclusive. Reference to that portion of matter must be understood to be made in and by everything that here follows.

Coeval with application and probation, is judication: as to application, under the natural system of procedure, all application is probative. Without the judge's being at the same time applied to, and acting at the very time that he is applied to, an application cannot in any case have place. Without permission to proceed, no applicant can be suffered to proceed. Hence, then, it is by application made by an applicant that the first moment is occupied: but it is by the applicant and the judge in conjunction, that occupation is given to the next moment, and thereafter to the number of minutes whatever they are, during which, at the initiative hearing, the intercourse continues.

On each occasion, to what judicatory shall or may application be made? The answer is short, and will naturally be satisfactory: To that judicatory, from application to which, the aggregate convenience of the several parties may most effectually be promoted and provided for.

No difficulty can have place in those cases which will always be of by far the most frequent occurrence. These are, where the residence of both or all parties is within the territory of the same judicatory, and where the subject-matter of the suit is also within that same territory.

The only case in which any difficulty can present itself, is that in which, the actual residence of the party applying to be admitted pursuer being in the territory of that same judicatory, the actual residence of other parties, co-pursuers or defendants, is in the territory of a different judicatory — the *actual* residence of each one of them, being at the same time capable of being different from the *habitual* residence: hence, by ringing the changes upon these differences, the following different cases are producible.

For holding communication between a judge

and a judgeable, the communication beginning with the judge, there are two modes — the oral and the epistolary. All other circumstances equal, the oral, it will be seen, is by far the best adapted to each of the several ends of justice: to the avoidance of non-decision and misdecision — to the avoidance of delay, vexation, and expense. But when the residence, habitual or actual, of the judgeable, is at a certain distance from the judicatory, then comes the question, — whether the advantage in respect of avoidance of non-decision and misdecision (to wit, through the inferior instructiveness of the evidence when elicited in the epistolary mode in comparison of the oral mode) preponderates or not.

On this consideration, exceptions (if any) excepted, no otherwise, it is understood, can application, if made, be entertained, than when made in the oral mode. And what is moreover understood is, that the judicial locations will be to such a degree numerous, and the plan of partition by which they are marked out, to such a degree equal, that from the attendance of a person at the judicatory, no considerable inconvenience will in general be produced.

CHAPTER VII.

PRACTICAL GENERAL RULES.

§ 1. *Rules as to minimization of evil.*

On each occasion, have constant regard for all the several ends of justice; that is to say, minimize the sum, or the balance of evil, composed of the evils opposite, respectively to these ends.

Of the several elements of value as applied to pleasures and pains, thence to good and evil, magnitude — the compound of intensity and duration — being the most apparent, be careful not to overlook those, which when the good or evil in question is distant, are most liable to be overlooked or undervalued — namely, propinquity and probability.

In like manner, in the case of any maleficent act or practice, whether on the part of persons at large, or on the part of judicial functionaries, forget not to take into account the evil of the second order, — to wit, the second order, composed of the danger, and the alarm, the publicly diffusive evil; any more than the evil of the first order — composed of the single-seated, and the domestically diffusive evil.

§ 2. *Rules as to irreparable evil.*

As to irreparable evil. It may be such either — 1. *absolutely*, or, 2. *relatively:* absolutely, to wit, in its own nature, relation had to the nature of man in general; relatively, to wit, relation had to the condition of the particular individual or individuals concerned. Death is so, in its own nature: pecuniary evil — pecuniary loss — is, in its own nature, in a greater degree more easily reparable, than evil in any other shape. Evil of a comparatively inconsiderable amount may be irreparable, relation had to the individual or individuals concerned.

Evil which, whether absolutely or relatively considered, is irreparable in itself, may also, relatively considered, not be irreparable in the way of equivalent.

Death is the only shape in which evil, on the part of the immediate sufferer, is certainly and invariably irreparable.

In the way, and by means of compensation, there is no evil to which it may not happen to be, in the instance of the individual in question, reparable in the way of equivalent.

Relation had to the individual in question, an evil is reparable, and exactly repaired, when, after having sustained the evil and received the compensation, it would be a matter of indifference whether to receive the like evil, coupled with the like compensation, or not.

What is manifest is — that to no person, other than the individual himself, can it be known whether, in his instance, between an evil sustained, and a benefit received on account of it, any compensation have place or not.

Considered with a view to its irreparability, the evil which an individual is liable to suffer is susceptible of the same division and distinction, as the sorts of offences to which an individual stands exposed: in the evil which is the result of the offence, may be seen the sole reason, or rational cause, for the endeavour, on the part of the legislator, to exclude or minimize it.

In this case, to minimize evil, have more especial care to exclude all such as is irreparable.

Irreparable evil may be produced — 1. For want of a judicial mandate; 2. By a judicial mandate.

The sides liable to be affected by it are — 1. The pursuer's; 2. The defendant's side of the suit.

Causes or sources, from which irreparable evil is mostly liable to flow, are —

1. Deperition, or ultimate non-forthcomingness, of the means of execution.

2. Deperition, or ultimate non-forthcomingness, of the means of proof, or say, sources of evidence.

Deperition, or ultimate non-forthcomingness, of means of proof, includes, if complete, deperition of the means of execution; to wit, in favour of that side, to the interest of which, in case of the proof, the execution would have been subservient.

Of a failure of the means of communication, deperition, or ultimate non-forthcom-

ingness, as well of means of proof as of means of execution, may be the result.

By execution, understand as well reciprocal, as direct: direct, it is called, in the case where the object of it is to render to the pursuer the service demanded by him; reciprocal, where it has for object the rendering to a defendant compensation for, or security against, vexation and expense produced by the pursuit.

When there are two antagonizing lots of evil, considered as liable to be produced, the one on the pursuer's side of the suit — the other on the defendant's — two evils, both irreparable, or the evil on one side reparable, on the other side irreparable, forget not to take into account the magnitude and value of each. On this occasion, let not the imagination be deluded by the impressiveness of the idea attached to the word irreparable. Loss, though certainly irreparable to the amount of a shilling, will not be to be guarded against with so much anxiety, as a loss, though perhaps reparable, to the amount of a pound.

In a wrong-imputing, yet not penal, private suit, the irreparable evil to be guarded against is, deperition of the means of compensation, or other means of satisfaction, for the wrong execution in respect of the service demanded by the pursuer's, at the charge of the defendant's, side.

In a purely public penal suit, the irreparable evil requiring to be guarded against, for the sake of the pursuer's side, is the impunity of the defendant, in the case of his having been, in the shape in question, a delinquent.

In every sort of suit, the irreparable evils requiring to be guarded against, for the sake of the defendant's side, are — 1. On erroneous, or inadequate grounds, conviction, and consequent burthen of compensation, or punishment, or both, imposed upon the defendant: he in truth, not having been guilty, not having committed the wrong imputed to him, or any other similar to it. 2. The evil composed of the vexation and expense to which, by means of the suit, he may be subjected — the evil correspondent, and opposite to, the collateral ends of justice.

§ 3. *Rules for the guidance of the judge in the exercise of his ulterior powers.*

On each occasion, the direct and first care and endeavour of the judge, will be the fulfilment of the direct ends of justice; to wit, by taking such course, or doing that which in each individual instance shall be most conducive to the fulfilment of the direct ends of justice, positive and negative; further, to wit, the causing to be rendered when, and in so far as due, the service demanded by the pursuer.

His next care will be the fulfilment of the collateral ends of justice; to wit, by minimizing, on each occasion, the quantity of evil in its several shapes, delay, expense, and vexation at large, at the charge of the several classes of persons, in relation to whom his powers will have to be exercised.

When, and in so far as, the collateral ends of justice on the one part are seen to antagonize with the direct ends of justice on the other, it will be his care to pursue that course, by the taking of which, the balance on the side of good is greatest upon the whole.

On each individual occasion, as a security for the maximization of the aggregate of good, and the minimization of the aggregate of evil, he will settle in his own mind, and make public declaration of, the reasons by the consideration of which his conduct has been determined; which reasons will consist in the allegation of so many items in the account of evil, on both sides: magnitude, propinquity, certainty, or say probability, and extent, — being in relation to each head of good and evil, taken into the account.

Proportioned to the clearness with which those reasons are conceived, will be his own assurance and satisfaction of the conformity of his proceedings with the ends and dictates of justice: proportioned to the clearness with which they are expressed, will be the satisfaction afforded to the superordinate authorities to whom he is responsible.

For these purposes the constitutional code, on the principles of which this procedure code has been grounded, gives to his legal power a latitude, to which in general there are no fixed limits; and, at the same time, maximizing according to its utmost endeavours, the efficacy of the checks provided for preventing such his powers from being employed to any sinister purpose.

With a view to the collateral ends of justice, the following are among the cautions which he will have to observe: —

The applicant having been received, in the character of pursuer, or pursuer's proxy, and in support of the application, his evidence, appropriate or simply indicative, or both, elicited — the judge will not, in relation to any other person of whatever description (a proposed defendant, proposed witness, if any, or proposed co-pursuer, if any,) perform any operation liable to be productive of vexation or expense, unless in his view of the matter, taking such evidence for correct, a probability has place, that at the charge of the proposed defendant, the service demanded, or some other, more or less analogous to it, is due.

To the minimization of avoidable delay, he will have especial regard. Of delay, every moment beyond what is necessary to the direct ends is detrimental to the direct ends,

as well as to the collateral ends, of justice. To the direct ends, by the intermediate eventual decease of the pursuer, by chance of deperition of sources of evidence on both sides; and in case of personal evidence, not already in writing, danger of diminution of clearness, correctness, and completeness, by faultiness of recollection. To the collateral ends,— to the prejudice of the pursuer's side, in so far as in the right, by and in proportion to the vexation attached to the non-possession of the service due — and incidentally by and in proportion to the expense, the need of which may have been produced by intervening accident; to the prejudice of the defendant's side, if in the wrong, in the greatest number of individual cases, it will not be; since the longer it continues, the longer he remains exempted from the service sought to be exacted at his charge.

But in so far as he is in the right, he stands exposed by it, equally with the pursuer, to sufferance, to the prejudice of the direct ends of justice, by deperition and deterioration of evidence, as above: and proportioned to his assurance of his being in the right, is the vexation he experiences from the apprehension of being ultimately regarded as being in the wrong, and on that account unduly subjected to the service, which though not due, is demanded at his charge.

But, of two or more applications made at the same time, no one is there which may not of necessity be made to suffer delay by the just demands made by others, in an indefinite number, upon the judge's time.

What may also happen is, that by deferring that which in the natural order of inquiry would be the next judicial operation to be performed, advantage may be produced, preponderating over the disadvantage, to any or all the ends of justice. As often as this is the case, the judge will accordingly defer, to some future time indicated, the performance of such next judicial service: but for reason, and justification, he will bring to view the particular incident or incidents by which exception has appeared to be made to the general rule.

In Buonaparte's civil code, the parties being in the judicatory of the justice of the peace, admitted into the presence of each other and the judge, — great is the anxiety expressed to prevent confusion on the occasion of such altercation as may naturally be expected: and on that account, for the prevention of that inconvenience, no person other than the judge is authorized to put a question to any other. In this anxiety, no cause for disapprobation can assuredly be found, especially when the character of the people he had to deal with is considered.

In English judicature, all cause for any such anxiety is effectually excluded: not existing in the presence of the judge, parties cannot quarrel or annoy each other in the presence of the judge. Saving the sparingly exercised right of the judge to put questions, to no party on either side is any question put by any sort of person but an advocate: nor, unless between advocate and advocate, or in an extraordinary case, in guarded terms, between advocate and judge, can altercation in any shape have place.

Among the cares of the judge, will in like manner be the minimization of the number of persons, of whatever description, operated upon by the exercise of his power; as also, in the instance of each such person, the number and vexatiousness of the operations imposed upon them respectively.

Accordingly, between the individual by whom, in each instance, the compliance necessary to the reddition of the service in question is to be produced, he will avoid interposing without necessity any intermediate hand. The reasons are —

1. By every such intermediate hand, so interposed, is produced a chance of delay, and a chance of ultimate failure.

2. By every such intermediate hand, so interposed, is produced vexation, if no compensation, or no more than inadequate compensation, be accorded: and in so far as compensation is accorded, expense.

Middle-agency-sparing, is the name given to this rule.

Of the application capable of being made of the middle-agency-sparing rule, examples are as follows: —

1. As per Constitutional Code, Chap. XII. Judiciary collectively. Giving to each immediate judge, once in possession of a suit, the faculty of operating for the purpose of it, in the territory of any and every other immediate judge; instead of an address from the judge of the originating judicatory, to the judge of the territory in which such several operations have to be performed; for though, for various purposes, notice of what is done may be requisite for the information of the judge in whose territory the operation is to be performed; so is it also, at the same time, for every needful purpose, sufficient.

By deferring the operation till after an answer from the judge in question had been received, or time for the reception of it elapsed, proportionable delay would be produced, and that without need or use.

When, for the purpose of justice, at the charge of any person, whether in the situation of defendant, or any other, the transfer of any subject-matter of property is to be made, let not the co-operation or consent of such person be made necessary to the validity of such transfer. If, at the hands of the person in question, disclosure of any matter of fact relative to such property be necessary, it will be exacted accordingly; but to no effect

for which such disclosure may be requisite, can concurrence in any way, in the act of transfer, be needful or of use.

§ 4. *Inflexible regulations, none.*

For minimizing evil, the main caution is, in no case, on no occasion, to lay down inflexible rules (in particular, inflexible rules as to quantity) — rules of which on any occasion the effect may be to prevent the minimization of evil in the individual case calling for decision at the hands of the judge.

The pretence in this case is, the avoiding to place arbitrary power in the hands of the judge. But the good thus sought is illusory. In the hands of a judge, power, in whatsoever degree arbitrary, is no otherwise an evil, than in so far as its effect is to produce evil in a tangible shape — to wit, human suffering — in the breasts of individuals. But where an inflexible rule, as to the quantity of anything, is laid down, the chances against its not producing evil in excess, are as infinity to one.

Against abuse of power, the only effectual, or efficient security, is composed of responsibility: substantial, punitional, and dislocational responsibility, legal and moral.

For the prevention of the abuse of power, on the part of judges, the appropriate place is accordingly, not so much in the procedure code as in the constitutional code.

For exemplification of the evil certain of being produced by inflexible rules in regard to quantity, take the three capital objects — matter of *satisfaction*, matter of *punishment*, and length of *time*.

First, as to the quantity of the matter of compensation, or other means of satisfaction. If there be a case in which, of the compensation thus inflexibly fixed, the quantity be deficient—in such sort deficient, as to be inferior to the profit obtainable by the wrong—it operates, by the amount of the difference, as an inducement to commit the wrong, instead of operating as a means of repression for the prevention of it.

So likewise in the case of punishment. If in the case of any crime, the punishment is, all things taken together, clearly inferior to the profit obtainable in the individual instance in question, by means of the crime, the effect of the so-called punishment is to operate by the amount of the difference, *not* as a repressive bond, for the prevention, but as an incentive and encouragement towards the commission of the crime. To one offence (by which in the individual case in question, the delinquent has gained £100,) let £10 and no more have been the sum fixed on, the obligation of paying which, constitutes the sole punishment imposed. The effect of the law is, to operate as a bounty upon the commission of the prohibited act—of the act thus inexpertly prohibited—as a bounty to the amount of £90, subject to the deduction of the expense, and the equivalent for the vexation in other shapes, attached to the situation of defendant, in these cases.

In the article of satisfaction and punishment, provision against improvidence in this shape belongs obviously to the field of penal law, not directly to the field of judicial procedure. Of improvidence in this shape, the marks are in a particular degree conspicuous in Buonaparte's codes.

Now as to the fixation of length of time: length of time, allotted for the performance of various sorts of operations. In general, the pretence, or expected good, is avoidance of delay: but in general, besides the production of the opposite evil, precipitation, and thence the evil correspondent and opposite to the direct ends of justice, it has for its effect increase of delay, or increase of expense and vexation, or all three.

A year was the maximum to which Frederick the Great of Prussia fixed the greatest length of a suit at law in his dominions: not small was the service he was regarded by himself and by many another well-wisher to justice, as having by this exploit rendered to justice. What was the consequence? In the first place, wheresoever the quantity of business necessary to the avoidance of the evil opposite to the direct ends of justice (positive and negative) could not be performed within that time — production of the evil correspondent and opposite to the direct ends of justice. In the case of a to a certain degree complicated mercantile account, for example; in the case of the death or insolvency of a large capitalist, having extensive dealings with foreign states, this could not but be frequently exemplified; and in any case, by the expatriation of a single witness, if a necessary one, the same impossibility of rendering justice within the so allotted compass of time would be produced.

Of a rule thus improvidently all-comprehensive, delay, the very evil sought to be thus remedied, would naturally be not uncommonly among the fruits. This being the length allotted to the sittings, a judge to whose sinister interest delay showed itself favourable, would avail himself of the ordinance, to run on to the full length of it. This, he would say, is what the ordinance requires. Well, to this ordinance I have paid unquestionable obedience.

Under the English system, generally speaking, fixed lengths of time are allotted for every operation; lengths of time without any the smallest regard to the quantity of time necessary to the ends of justice — the different quantities demanded by different distances between place and place — the differences in respect of the degree of complication

in the causes — the abodes of parties and necessary witnesses; in a word, not any the smallest regard is, in any part of the system of fixation, paid to the circumstances, nor therefore to the interest or feelings, of any of the individuals concerned.

In so far as the time is rendered unsusceptible of enlargement, here, in many instances to a certainty, is evil to a vast amount necessitated—evil, in that shape in which it is correspondent and opposite to the direct ends of justice. In so far as it *is* susceptible of being enlarged, here is a quantity more or less considerable, added to the fixed quantity of delay, vexation, and expense; for application must be made to the judicatory — application for the additional quantity of time. In support of the application, evidence must be produced — application with fees to solicitors, advocates, subordinate judicial officers, and perhaps judges — evidence carefully manufactured into the most unapt, delusive, and expensive shape.

Thus goes on the game of leap-frog, between strictness and liberality — each being in this, as on every other occasion, covered by a thick coating of well-paid and self-applied applause.

In English practice, whenever you see or hear the word strictness, expect to see injustice: you will seldom be disappointed.

Of the judicatories self-styled Equity courts, dilatoriness is, to the knowledge of everybody, the characteristic and most glaring cardinal vice. But could any unpaid eye endure to look into it, precipitation might be seen carried to a no less high degree of perfection: precipitation, by which in an extensive class of cases, the production of the evils correspondent and opposite to the direct ends of justice is habitually and with certainty secured.

Even at the commencement of every suit, in this kind of judicatory, the time allotted is, in most instances — considering the work that is to be done by it, and the lengths of necessary journeys — too short to admit of the work being done: for remedy, on payment of £1: 7s. to Judges and Co., two several additions may be made, by the half of which, it is rendered in most cases too long. A temptation is in every case held out to purchase a third length of delay: but under this indulgence lies a trap, in which the comparatively inexperienced law-practitioners are frequently caught, and this in such sort as to produce, to the dismay of their respective and unsuspecting clients, the evil correspondent and opposite to the direct end of justice; — the client loses his cause, because, willingly or unwillingly, his lawyers have been deceived.

§ 5. *Substitution to inflexible rules.*

Of the several rules laid down in this code, there is not one that is meant to be regarded as inflexible: no one is there, from which, in case of necessity, the judge may not depart. But as often as he thus departs, the constituted authorities (the public-opinion tribunal included) will be looking to him for the reason — the specific reason or reasons, by the contemplation of which, such departure shall have been produced; and as often as he does this, without the assignment of any specific reason, he will be considered as having violated his official duty.

Every such reason, will consist in an indication of the evil which, in the individual case in question, would result from compliance with the rule: and with a proof, that by the aberration, either no evil in any shape has been produced, or none but what has been outweighed by concomitant good.

So in regard to exceptions. In many instances where a rule is laid down, in the terms of it, reservation is made of exceptions, and a string of exceptions is thereupon subjoined. To every such rule, the judge is at liberty to add an exception; but for every such exception, an appropriate and sufficient reason will be looked for at his hands.

§ 6. *Which side is most likely to be in the right?*

Antecedently to the view presented by the inquiry into the particular fact of the individual case, the general presumption arising out of the several relative situations will be in favour of the pursuer's, which is as much as to say, in disfavour of the defendant's side.

The general reason is, that without some ground of assurance and belief in respect of the correctness of his judgment, it is not likely that a person would engage in, or would subject himself to the vexation and expense attached to, the character of pursuer, even in case of success, — together with the still more ample eventual quantity in case of ill success. Thus on the score of mere self-regarding interest, particularly when the force of the additional restriction, applicable by sympathetic affection is added — a moral power which, how weak soever in comparison with self-regarding affection, should not in this, any more than any other case, be left altogether out of the account.

At the same time, the greater the success with which the endeavour to attain the ends of justice, direct and collateral, is crowned, the less will be the difference produced in that respect between the two correlative situations. The less the vexation and expense attached to the situation, the less effective will be the restraints, the tendency of which is, to prevent a person from embarking in it.

In so far as the present proposed code is rightly directed to those exclusively legitimate ends, strong is the contrast it will be seen to form with the English system of procedure, not to speak of others less renowned for a supposed regard for the ends of justice.

CHAPTER VIII.

JUDICIAL APPLICATION.

§ 1. *Judicial Application — what.*

THE system of judicial procedure, it has been seen, has for its proper object, the giving execution and effect to the ordinances of the legislature.

The functionary, by the exercise of whose function execution and effect is given to the ordinances of the legislature, is the judge. The means by which that result is produced, is the rendering to a person, who having need of it, makes application to him accordingly for the sort of service, by the rendering of which the result is produced. Name of such appropriate services — judicial services.

The species of application by which such judicial service is called for, call it a *demand*.

The aggregate of the whole operation produced by a judicial demand, from the demand to the last operation by which execution and effect is given to the portion of law in question, both inclusive, — call it a suit in law, or for shortness, a *suit*.

In English practice — by a denomination manifestly inappropriate and productive of continual confusion — it is also called *a cause*.

But the case in which a *demand*, made at the hands of a judge, for services tending to the giving execution and effect to some corresponding portion of the text of the law, is the service called for, — is but one out of several cases in which, for judicial service tending to the production of that effect, application may be made, and that application complied with.

Accordingly, of divers sorts of application, by each of which judicial services of the tendency in question are applied for, and demanded — the application called a judicial demand, and by which, if ordered, commencement is given to a suit, is but one.

By a judicial application, understand an application made to a judge as such — by any person other than a judge as such.

By any person who is desirous of obtaining judicial service in any shape, a judicial application may accordingly be made.

By judicial service, understand every such service as a judge, as such, is warranted by law in rendering to any person or persons.

The services which it belongs to a judge as such to render, will be mostly those which are rendered in *contentious*, or say *contested* cases, — that is to say, cases in which a suit has been instituted, and continues depending. But neither are cases wanting, in which, without any suit instituted, it belongs to the judge to render certain appropriate services. So many of these cases — so many are the different *purposes*, for which a judicial application may be made. Certain cases, moreover, there are, in which, for the adjustment of the different interests concerned, judicial services may be necessary, even where no disagreement as between party and party has taken place. Of this sort is the case where the demand made to the judge is simply *requisitive*, and not, with relation to any party, either criminative or inculpative.

§ 2. *Applicant's Judicatory — what.*

It being desirable, in so far as practicable, that the territory in which the person in question will be most likely to be called upon to pay judiciary attendance, should be the territory in which he has his most ordinary habitation, in contradistinction, and in preference to, every more distant judicatory: hence it is desirable, that by persons in general, considered in respect of the need they may have to make judiciary application, it should be understood what, in the case of an applicant, is meant by *his* judicatory — as in the case of a judge, by *his* territory.

By the *applicant's judicatory*, understand the judicatory belonging to and situate in the sub-district in which, as housekeeper or inmate, as per Election Code, the applicant has his settled habitation, if any such he has. If, in each of divers sub-districts, he has a settled habitation, or divers settled habitations, so many as there are of these sub-districts, so many are his judicatories.

To an applicant who has a settled habitation elsewhere, but not in the sub-district to the judicatory of which he makes his application — as also, to an applicant who has no settled abode, — the judicatory, whatsoever it be, to which, on the occasion in question, he makes such his application, is, on and for that occasion, his judicatory; say his *occasional judicatory*.

Of the facility thus afforded to persons in the character of judicial applicants, no increase of vexation to persons having occasion to act in a judicatory in any other character, such as that of a defendant, or that of a witness in a suit, will, it will be seen, be the result.

In every case, therefore, any person whose desire it is to make application to a judicatory for any purpose, may in the first instance make application to his own judicatory.

If, the design of his application being to commence a suit against any person, the do-

micile of that person is within the same local field of judicature, the case is in that respect the ordinary case. If such intended defendant has not any domicile within that same field, the case is in that respect an extraordinary case. It constitutes one of the natural causes of obstruction to the course of justice; provision for which is made elsewhere.

On hearing him, the judge will inform him what course to take.

§ 3. *Order of making application.*

For all persons waiting to be heard as applicants, the station is in the visitors' gallery: as to which, see Constitutional Code.

On entrance into the gallery, the intended applicant receives from the doorkeeper a ticket. The tickets are numbered in numerical order. He who, at or after the opening of the door, came first, received a ticket No. 1; he who came next, No. 2; and so on.

Immediately as the business of an applicant is finished, the judge or registrar makes a sign to the door-keeper of the gallery. The door-keeper, calling to the expectant applicant whose number entitles him to be next heard, looks at his ticket, and directs him forthwith to the applicant's station.*

If applicants more than one are desirous of speaking on the same occasion and in support of the same application, they must first have agreed among themselves as to the order in which they shall speak; if the whole number persist in speaking together, they will all of them be made to withdraw, until they have agreed upon the order of procedure as above.

If, with desires mutually opposite, a number of applicants offer themselves to speak on the same occasion, in relation to the same matter, each struggling to be heard before the rest, the order of procedure will be decided among them by lot.

§ 4. *Personal Attendance.*

Purposes for which the personal attendance of an applicant in the justice-chamber, while making his application, may be necessary or useful, with reference to his own desires, are —

1. Furnishing appropriate evidence as to facts, collative and ablative; say *Appropriate-self-serving-evidence-furnishing.*

2. Furnishing indicative evidence as to the above; say *Indicative-evidence-furnishing.*

3. Furnishing, at the instance of the judge, any such evidence as (though the tendency of it may be contrary to *his* desires) may be necessary to the preserving of other persons from vexation and expense, contrary to the ends of justice; say *Furnishing self-disserving* or *confessional evidence.*

4. Furnishing security against undue vexation imposable upon others, on the occasion of the application; say *Responsibility-affording.*

5. Furnishing means of co-enduring communication with him, for the purpose of the application; say *Accessibility-securing*, or *means-of-communication-affording.*

6. Receiving from the judge, warning against the damage liable to be sustained from sinister interest of *proxies*, professional or even gratuitous; say *Tutelary-advice-receiving.*

7. Receiving at the best hand, *i. e.* in an immediate way, the advice of the judge as to proceeding or not proceeding in the application; as to the mode best adapted to the ends of justice; say *Ulterior-course-concerting* or *settling.*

As to *Responsibility-affording:* — Evils against which, on the occasion of a judiciary application, appropriate security may be necessary, are —

1. Waste of judicatory's time; thence delay, or even denial of justice, to those who otherwise would at so much the earlier time, have been litigants.

2. Undue vexation and expense, to persons whose interest, according to the service demanded by the application, may come to be detrimented by ulterior proceedings. But, in so far as the applicant, though he be not the principal, can give as good security against these evils as the principal could, his attendance may be as useful as the principal's.

As to *Accessibility-securing*, or means-of-communication-affording: — The uses of securing adequately lasting means of certain communication with the applicant, are two, viz. —

1. Securing to him, if granted, the service demanded.

2. Securing the public and individuals against the evils just mentioned.

Hence the persons, communication with whom should be secured, are — 1. The principal at any rate; 2. The applicant, if a person other than the principal. But in so far as this security can be as effectually afforded by the applicant, as by the principal, the principal's attendance is needless for this purpose.

As to *Tutelary-advice-receiving*: — As to this purpose, in so far as the need has place, the demand for the principal's attendance is strongest. True it is, that if the need exists, it may be made visible to him, by the record of what passed between his proxy and the

* In a code of procedure, the insertion of particular regulations of this sort are necessary to obviate hesitation, doubts, and diversity of practice. In a short time, practice will render them familiar.

judge, and that for the purpose of such advice, the judge may, if he sees reason, command the principal's attendance. But, on the matter of the record, he may be more or less ill-qualified to form a judgment for this purpose. And there may be reason for his receiving the judge's advice, though by indolence, or some other motive, the judge may be prevented from commanding his attendance for that purpose.

As to *Ulterior-course-settling*:—If the case be such, that the principal has need of the judge's tutelary advice as above, the ulterior course, which it will be most fit for the procedure to receive, may depend upon the nature of such tutelary advice.

These considerations will serve as a memento to the judge, to be on the watch, for the need which may have place in relation to this tutelary advice.

As to *Confessorial-evidence-furnishing*:—For the prevention of evils to other interessees, true it is that the attendance of the principal may, after the attendance of the proxy, require to be exacted. But supposing it exacted time enough for such preventive purpose, the exaction of it, in the first instance, is to this purpose needless.

§ 5. *Applicants — who.*

On the occasion of a judicial application, applicants require to be distinguished, in the first place, into principals and proxies.

A principal applicant, is he by whom the application is made on his own account. A proxy applicant, is he whose application is made on an account of another, or others. In respect of a joint-interest, the same person may be applicant on his own account, and likewise on account of his co-interessees.

In relation to the benefit, or the burthen which is the object of the application, the applicant may be possessed, or not, of special interest, or any peculiar and self-regarding interest, in the subject-matter of the application. A person, the purpose of whose application is the procuring some benefit for, or the averting some burthen from, an individual or a community, with whom he is not connected by any special tie of self-regarding interest, is an applicant not possessed of any special interest in the subject-matter of his application.

A special interessee, may be so either on a purely self-account, or on a purely trust-account, or on a compound-account.

In so far as a person is interested on behalf of another, to whose interest he stands bound to give special support, he is styled a trustee on behalf of such other, or others; and the interest he thus possesses is styled a *fiduciary interest*; and the law by which he is so bound, is styled *a trust-creating law*: the person on whose account — for whose sake, the trust is created, is styled a principal in the trust, or say a *benefitendary*.*

When a trust is created by law, as above, it may be either with or without the instrumentality of a person or persons operating to that purpose: when it is with such instrumentality, the person or persons so acting may be styled trustee, or trustees. In this case, there are three parties connected and jointly interested: — to wit, 1. The benefitendary; 2. The trustee; 3. The trustor or trustors; or say, the trust-maker or trust-makers.

In some cases, the trustor and trustee may be the same person: in these cases, the trustee is a *self-constituted trustee*; or say, an uncommissioned trustee.

When it is by the benefitendary that, under the sanction of the law, the trust is created, and a person or persons constituted and created trustee or trustees, it is by contract between such benefitendary on the one part, and the trustee or trustees on the other.

Examples of trusts and trustees, created by act of law, without the instrumentality of any person or persons, are as follow:—

1. A husband, acting and applying on account of his wife.

2. A father, in quality of natural, that is to say, law-located guardian to his son or daughter under age.

3. A mother, in default of her husband, in quality of natural, that is to say, law-located guardian to her son or daughter under age.

4. A guardian, in the case where, without need of his own instrumentality, he is law-located as such, in relation to a person under age.

5. A guardian, in the case where, without need of his own instrumentality, a person is constituted such, with relation to a person labouring under mental derangement.

Examples of trusts and trustees, created such by act of law, by and with the instrumentality of the trust-maker, but without

* In the English system, the benefitendary has no other name than *cestuy que trust*. This denomination, being taken from the obsolete law French, is altogether unintelligible to all but lawyers. Conspicuous is the awkwardness of its frame: it is a sort of an elliptical abridgment of a long phrase, the tenor of which remains to be divined: suppose *cestuy al bien de qui le trust est creé*. In the case of his being regarded as actually benefited, this benefitendary will naturally receive the appellation of a benefitee. But the actual fulfilment of the design entertained or professed to be entertained, is too precarious to admit of the substitution of the appellation *benefitee* to the word *benefitendary*. Witness the breaches of trust, the aggregate amount of which, in the case of charitable trusts, is under Matchless Constitution so enormous, as per the commission of inquiry, now so many years depending.

the instrumentality of the beneficiendaries, are as follow: —

1. A testamentarily-located post-obituary administrator: the beneficiendaries in this case, with or without the administrator himself, are the co-interessees, as above, in the mass of property left vacant by the death.

2. The case where a person, desirous of conferring a benefit on a certain person or persons, invests a mass of property in the hands of a trustee or trustees, in trust, to be disposed of in a certain way mentioned, for the benefit of a person or persons in the character of a beneficiendary, or set of beneficiendaries.

Examples of trusts and trustees, created under the sanction of the law, by the trustor and trustors, and the beneficiendary and beneficiendaries, in the way of contract, are —

1. The case of a general agent and his principal; a general agent, to wit, or trustee, to whom the principal, as beneficiendary, entrusts the management of his pecuniary, and other interests in general. To this head belongs the case of a steward receiving the whole income of his principal.

2. The case of a special agent, acting in the capacity of a steward of a particular landed estate.

3. The case of the manager of a manufacturing concern.

4. The case of an agent or factor, acting in the sale of a particular article, or set of articles, whether in the way of ordinary sale, or in the way of auction.

5. The case of an agent or factor, acting as such, in behalf of a principal, habitually or temporarily resident in a foreign country.

In the Constitutional Code throughout, but more particularly in those chapters which concern the business of the administrator's department, may be seen mention made of divers functions, as exercisable by public functionaries, for the benefit of the public. In the instance of many, if not all of them, functions of the same nature, and thereby susceptible of the same denomination, are exercisable, and everywhere habitually exercised, by individuals in the character of trustees, on behalf of individuals, and bodies of men, in the character of beneficiendaries.

Examples of applicant co-interessees are —

Where a partner attends on account of himself, and his co-partner, in respect of the partnership estates.

A person attending on account of the mass of property belonging to an individual, or a partnership, in a state of insolvency.

A person attending on behalf of a body-corporate associated by law, and being or not being a member thereof.

A person attending as a representative, or member of a body of persons associated either promiscuously or on a special occasion, and for a special purpose, but not incorporated by any legal instrument.

A person attending, in a case of alleged and supposed necessity, in the character of a self-constituted trustee, for any of the classes of principals above mentioned, on the ground that, by negligence or sinister design, or by reason of a blameless want of appropriate information on the part of the proper trustee or trustees, the interest of the principal would, but for such application, be exposed to suffer irreparable damage.

§ 6. *Interessees — who.*

A person who on any account makes judicial application to a judicatory, becomes, by so doing, or assumes himself to be, an *interessee*.

Interessee is a word bearing reference to some subject-matter. By an interessee, understand a person possessing a legal interest (an interest sanctioned, or considered as being about to be sanctioned, by law,) in the way of profit or loss in some assignable subject-matter.

Such interest a man may possess either on his own account, or on that of another: if, and so far as it is, on his own account, it is a self-account interest; if, and so far as it is, on account of another person or persons, it is a trust-account.

A person who, with reference to the same subject-matter, is a self-account interessee and a trust-account interessee, may be styled a joint-account trustee.

An applicant, applying on behalf of a number of self-account co-interesses, is with relation to them a representative: he is on that occasion their representative; if he is one of their number, a joint-account representative; if he is not of their number, a trustee-representative.

Of an interessee's becoming such, the cause is, either his own agency alone, or the agency of some other person or persons alone, or his own agency in conjunction with that of some other person or persons. In the first case, he is a purely self-constituted interessee; in the second case, a located interessee; in the third case, a consenting located trustee.

A located trustee, is located either by the law, that is to say, by the legislature alone, with or without his consent, or by the law and some other person or persons jointly. In the first case, there is no trustor; in the second, there is a trustor, or set of trustors.

Of cases in which a trustee is located by the law alone, examples are as follow: —

A father, in respect of the power exercised by him in relation to, and over his children.

A husband, in respect of any such power as is given him, by law, to be exercised in relation to, and over his wife.

A guardian, in respect of the power over the person and property of his or her ward,

in so far as established by law, without need of concurrence on the part of any person.

A trustee may be such, either without power or with power over persons or things.

A self-constituted trustee, as above, is a trustee without legal power. Without commission from any beneficiendary, or any located trustee, or the law, — undertaking the performance of a certain service, for the benefit of the beneficiendary, he constitutes himself, in so far, a servant of such beneficiendary: and for damage done to any person, on the occasion of such service, or supposed or pretended service, he is compensationally, and in case of sinister design, and evil consciousness or temerity, punitionally responsible.

Of joint-account representative applicants, examples are as follow: —

1. A person applying as member of a private partnership.

2. A person applying as member of a joint-stock company.

3. A person applying as one of two or more trustees, located as such, with power over a mass of property, placed at their disposal, for their own joint benefit.

Wheresoever a trustee is located as such, *a trust* is said to be established.

By a trust, understand a power, burthened with obligation — with the obligation of giving to the power such exercise, as in some particular way to render it serviceable to some person or persons, determinate or indeterminate, in any number, up to that of all the inhabitants of the political state.

Parties to every trust are — first, a person or persons by whom the service is intended to be rendered; second, a beneficiendary or beneficiendaries, to whom the service is intended to be rendered.

If it were by a single individual, that the trustee or trustees was or were located, he, in relation to them, is locator — sole locator; if divers individuals, each of them is a joint locator.

A trustor, by whom a trust is established by the location of a certain trustee or certain trustees, with power for continuing the trust, and preventing its extinction, by successive acts of location, may be styled the *founder* of that same trust.

§ 7. *Application how commenced.*

At the proper station, the applicant sits or stands in silence, until addressed by the judge.

Judge to applicant: — What is it you have to tell us of? —

1. A service which you claim, for yourself or any one, at the hands of any one?

2. A wrong for which you claim, for yourself or any one, satisfaction at the charge of any one?

3. A public offence, as to which you are ready to give us information?

4. Or anything, and what else?

After utterance of the introductive question, ending with the words *tell us of*, the judge makes a short pause, to give time to the applicant to say, *Prepared, sir*, or, I am prepared — if such be the case.

By the word *prepared*, the judge understands that the applicant is sufficiently prepared to state the nature of his application, under one or other of the above heads, without need of assistance from the judge.

If no such intimation is conveyed, then only it is that the judge proceeds to enumerate the several above-mentioned purposes, and modes of contentious application, that the applicant may settle with himself, and declare to which of them the matter he has to state belongs.

If, for want of appropriate aptitude, the applicant is unable to give, in the first instance, an intelligible answer to the above questions, in such manner as to refer the case to any one of the general heads already brought to view, the judge will continue hearing and interrogating him, till the import of his application is sufficiently ascertained.

For giving facility to these examinations, as well as for other purposes, a set of appropriate tables will have been provided, and kept hung up in the justice-chamber, in such manner as to be legible to the greatest possible number of persons at once; as also the like in smaller form, in such sort that one copy may be held in hand by the applicant, and another by the judge.

Examples of these tables are as follows: — *Table* 1. Table of *services exigible*, or *rights obtainable*, containing a list of the several sorts of effective services, which by the corresponding judicial services performed by the judge, one person may claim at the hands of another, without the imputation of wrong from the not having rendered them; adding to each service the several efficient causes of the right or title to receive it.

Table 2. Table of wrongs, *private* and *publico-private*, with the correspondent remedies; consisting in modes of satisfaction, with or without modes of punishment added or substituted to satisfaction, as the case may be.

Table 3. Table of *purely public wrongs*, with the correspondent remedies.

For these several tables, heads and matter may be seen in the *Introduction to the Principles of Morals and Legislation*, and in the *Traité de Législation Civile et Pénale.**

If the applicant can read, the judge causes such of these tables as may serve for his assistance to be put into his hands, having in his own hand or view, copies of the same: if the applicant cannot read, the copy which

* See Vol. I. p. 96, *et seq.*

the judge has, assists him in putting questions or giving instructions to the applicant, as the case may require.

If the application be contentious, the conversation will proceed as per Chapter XII. *Initiatory Hearing*.

If the application be uncontentious, the applicant will name it as above by its appropriate generic denomination.

To save time, these denominations will not, like the others, be recited by the judge. They are of comparatively rare occurrence; nor will they need, any of them, to be made by any person who is not able to explain himself sufficiently on the subject; to wit, either by perusal of the code, or by previous conference with some friend, from whom sufficient instruction and direction will have been obtained.

In any case, it may be either on the applicant's own account, or on account of some other person, that the application is made. But how the matter stands in this respect, the judge will without difficulty understand from the applicant's statement. Interrogations to that effect need not therefore be included in the judge's address as above.

For the several cases in which one person may make application on behalf of another, see Chapter XII. *Initiatory Hearing*.

At the commencement of the conversation, or at any time in the course of it, if it be clear that the applicant can read, the judge with his hand may point to, and if near enough, touch the spot on which the legend containing the warning against falsehood is displayed: as to which, see Chapter *Judiciary Collectively* (Ch. XII.) in the Constitutional Code.

In the case of an information, he will take the same course as above for ascertaining the nature of the wrong complained of, or the service to which the party in question has a right.

If it be the case of a wrong, as it commonly will be, and most commonly that of a crime, he will collect from the informant whether he be or be not desirous or content to be a pursuer, alone or in conjunction with some other individual, or the government advocate, or both; which done, he will determine as to the complying or not complying with the desire.

In this case more particularly, a question liable to come under consideration will be, whether the fact spoken to in the information be the criminal act itself, or only a fact capable of operating in the character of circumstantial evidence; and in both cases, whether according to his account the informant was in relation to the fact in question, himself a percipient witness, or whether all he has to speak to is his having reason to believe that another person, known or unknown to him, may probably have been, in relation to it, a percipient witness. In this latter case comes the demand for investigation, as explained in another chapter.

As already observed, there is no sort of case in which there may not be need of such investigatory process, nor any in which the service rendered to parties by the employment of it may not outweigh the vexation and expense. But in England, it not being employed but in cases regarded as belonging to the highest classes of crimes, or in judicatories into which the eye of the public scarcely penetrates, those higher classes of cases are the only ones in which the need of it can be expected to present itself to the generality of readers.

As to the person, if any, to whom the address shall be made by the judge before any is made to the defendant, — here again is a point in relation to which an option will be to be made by the judge.

So likewise in regard to the three several modes of address above mentioned.

On this occasion, too, will come the consideration whether to consign the function of pursuer to the government advocate; and no sooner does reason sufficient for this operation present itself, than the judge will perform it accordingly, that his opinion and decision respecting the points above mentioned may be heard.

§ 8. *Application — its purposes.*

In regard to purposes, the leading principle seems to be, that to all purposes that can with propriety be termed judicial, the faculty ought to be open to exercise; and to render the purpose judicial, it is not necessary that on the occasion in question a suit should actually have been instituted. It is sufficient, if either a probability having place that a suit of a certain description will be instituted, it will in probability be conducive to the ends of justice that the service aimed at by the application should be granted; or that if the service be granted, a suit conducive to the ends of justice may in probability be instituted, and the ends of justice thereby attained, in a case in which, but for this same service, a suit might otherwise not have been instituted, and thereby the ends of justice might have failed of being attained.

Cases there are, in which, though strictly speaking the business is not of a judicial nature, inasmuch as no contestation hath as yet place, and though at the hands of the judge no judicial termination of a suit may come to or be intended to be called for, — yet among the powers necessary to be exercised for the accomplishment of this desirable purpose, are some of those which are indisputably attached to the office of judges. Of this sort is the evidence-eliciting power and function.

On the present occasion will be added cer-

tain powers, the demand for the exercise of which is created by some accident, or other event, by which it cannot without previous inquiry, that is to say, elicitation of evidence, be ascertained whether or not there may not be litiscontestation, and in consequence of it, demand for the exercise of powers exclusively attached to the office of judge. Had the state of facts been previously known, the powers necessary to the production of the desirable effect — for instance, the staying or reparation of calamity in this or that shape — might have been exercised by other efficient hands; but no such hands being in readiness, and those of the judge being in readiness, it is by them that the powers in question are exerciseable, with more effect than by any other, and by them that it is accordingly fit they should be exercised.

The purposes for which an individual may make application to a judge, as such, are either—1. Ordinary; 2. Extraordinary. The ordinary are,—1. Contentious; 2. Simply informative. The extraordinary are—1. Consultative; 2. Damage preventive; 3. Prospective-evidence-securing.

Purpose — contentious. By the contentious purpose, understand the purpose to institute a suit at law. When from the declaration made by the applicant, it appears that this is his purpose, and when by the judge his prosecution of this purpose is allowed, the suit is declared to be instituted, and the hearing thus going on is declared to be the initiatory hearing in relation to this same suit. The applicant in this case is a pursuer.

Purpose — simply informative. In contemplation of a certain criminal offence or wrong, from which he or some other individual, or the public at large, has suffered damage, or as he supposes was in danger of receiving damage — an applicant who is desirous that pursuit on the ground thereof be made by some one else (for example, by the constituted authorities,) but is not desirous to act for himself as pursuer, desires to be admitted to deliver information thereto relative, — such applicant is an informant.

If, in contemplation of an eventual suit purely non-penal, information through regard to the ends of justice or to the welfare of a party supposed to be interested, is given by an individual who has not himself any special interest in such suit, — this application is that of a non-commissioned proxy.

In English practice, on both these grounds, applications have place every day in certain criminal cases. The cases are mostly those in which the punishment attributed to the offence rises to the height of what is so unintelligibly called *felony*. But if in a judicial case of this sort, the receipt of information is capable of being of any use, so is it in every other. Yet in no other case is there a judge who will receive it. The sort of judge by whom, in this case, the information is received, is not the judge under whom the suit will receive its termination, but the sort of judge by whom a sort of preliminary, incomplete, and never-conclusive inquiry is carried on; to wit, the justice of the peace.

Purpose — consultative. By the consultative purpose, understand the purpose which is in view, when, being in doubt concerning the interpretation that may eventually be put by the judge on a certain portion of the body of the law, the application has for its object the calling into exercise the judge's pre-interpretative function. The applicant in this case is a consultant.

The motive for the consultation is — either for his own sake or that of some person in whose welfare he takes an interest, where a certain course in which the law has, as he supposes, a bearing — an anxiety to know in what manner it would by the judge be eventually regarded as bearing

Of the cases in which a demand for an application for this purpose may have place, examples are as follows: — 1. Conveyance: the applicant desirous of making, on certain conditions, conveyance of a certain right, of or relating to a certain mass of property, but not sufficiently assured of the validity or the impunibility of such conveyance. 2. Contract: so in regard to a contract to a certain effect. 3. Prohibited acts: so in regard to a certain act at large, which he is desirous of performing, but is not sufficiently assured of its not being regarded as prohibited, and thence punishable.

Purpose — damage-preventive. According to the source of the damage, this purpose may be —1. Calamity — damage-preventive; 2. Delinquency—damage-preventive; 3. Absenteeship — damage-preventive.

For examples of the modification, of which calamity is susceptible, see Constitutional Code, Chapter XI. § 5, *Preventive Service Minister*. So likewise, for damages through delinquency. Under calamity include casualty; the difference being only as between greater and less; determinate separative line, there is none.

For the prevention of calamity—prevention of the commencement or the continuance, as the case may be, — application may also be made to a preventive-service functionary, as per Const. Code, or to the local headman.

If for the rendering of the service needed, powers such as belong to the judge, and not to those two other functionaries respectively, are necessary, then is it to the judge alone that application will be to be made; and if made to either of those other functionaries, the applicant will by them be referred to the judge.

By the absenteeship-damage, understand

that which is liable to have place for want of proprietary care; the proprietor, known or unknown, distant from the spot, and no other person at hand, with sufficient authority and inclination to prevent the damage. Examples are —

1. Agricultural produce perishing for want of being gathered in.

2. Agricultural live-stock perishing for want of sustenance.

3. Perishable stock in trade perishing for want of appropriate care or sale.

For this purpose, application may also be made to the local headman.

Purpose — prospective-evidence securing. The purpose here is the saving a right, or a means of repressing a wrong from being lost for want of appropriate and judicially receivable evidence. Personal evidence is liable to be lost by death, physical inability, or local transfer of the person from whom it should have come; written and other real evidence by destruction, mislaying, or local transfer. If after commencement of a suit grounded on it, evidence should be made forthcoming, so should it before: reason in both cases the same. By securing it before the suit a suit may, in many cases, be prevented. In non-penal cases, the need is more apt than in penal cases, to have place: but as to the supply, if in any case conducive to the ends of justice, so it is in every other.

The person from whom the evidence is needed, may be the applicant, or any other person. In the first case, all that is demanded is, that the evidence which the applicant is ready to deliver, either be received and recorded: added or substituted, in the other case, is the demand that, as in an already existing suit, an appropriate order be delivered, ordering by whom, when, where, and how, it is to be delivered. The applicant in the first case is a prospective evidence offerer; in the other, a prospective evidence demandant.

In both cases, precautionary arrangements are needed for the prevention of abuse.

Under the English system, application for this purpose is not altogether without example. But by the example, such as it is, so far from being removed, the imputation of improvidence and inaptitude is but established and exposed. Co-extensive with the whole field of legislation and judicature is as above, the need; under the English system, no more than a corner of that same field is supplied.

As to the means of obtainment, so far from being obtainable without a suit, it is not obtainable without a suit of the most expensive kind, — a suit in equity, instituted for that sole purpose, unless already instituted for some other. Field of supply, a portion of the field of equity jurisdiction. What the whole is, belongs to the category of things unknown and unknowable: so likewise what this portion is; on each occasion, the whole and the part are whatever the judge pleases. Within that part, does your case entitle you to the service? Ere you can form the slightest guess, you have an ocean of distinctions to wade through — distinctions without reason and without end. Ask the chancellor, and when you have distributed a few hundreds, or a few thousands of pounds among him and his partners, creatures, and dependants, — at the end of a course of years, he will either tell you, or not tell you; and if he tells you, he will either grant you the supply or refuse it, making proclamation all the while of the profundity of his reflection, the acuteness of his discernment, and the anxiety of his fostering care. When thus granted in words, you will take proceedings for obtaining it in effect, and before they are concluded, be not surprised, if the evidence has perished.

§ 9. *Mode oral — why.*

No otherwise than orally delivered, and in the justice-chamber, is any judiciary application receivable.

But by any applicant attending as such, any letter, to whomsoever addressed, whether to himself or to the judge, or to any other person — may be read or presented for reading: the letter being open, and containing matter relevant to his application; and the applicant being responsible, in respect of the contents and the purposes for which it is exhibited.

A person by whom an application is made, and by whom accordingly an appropriate discourse is addressed to the judge, may, for occasional assistance and support, bring with him any person not specially inhibited. But for special reason assigned by the judge, any such assistant or supporter may be ordered and made to withdraw.

Concerning any matter, in relation to which judicial application may be made to a judge, no application can lawfully be made to him elsewhere than in open judicatory. To make any application elsewhere is, in the party making it — in attempt or preparation — an act of *corruptingness*, and as such, punishable; to receive it without disclosure, is in a like manner, on the part of the judge, an act of *corruptedness*. As to this, see Constitutional Code, Chapter XII. § 15. *Secret Intercourse obviated:* and also for the cases in which it may be requisite that the discourse should be secret, and for the mode in which such secresy shall be kept.

§ 10. *Oaths, none — why.*

Question: As a security for testimonial veracity, why is not the ceremony called *taking an oath*, here employed? — *Answer*:

Because it is needless and inefficacious to every good purpose: to evil purposes, in prodigious extent, effective.

It is needless. The responsibility here proposed — responsibility satisfactional, punitional, and upon occasion, dislocational — responsibility to the legal sanction, responsibility to the popular or moral sanction, to the judicial and public-opinion tribunals — is abundantly sufficient.

It is inefficacious. Utterly devoid of efficacy it is proved to be, by universal and continually repeated experience. Under the English system, its invalidity, in respect of moral obligation, is abundantly recognised by the practice of the constituted authorities.

1. In the situation of jurymen in general. In no instance, when any difference of opinion has place, can any verdict be given without a breach of the promise thus pretended to be sanctioned. The verdict being delivered as unanimous, jurors in any number, from one to eleven, must have done that which they have all of them sworn not to do, — uttered a declared opinion contrary to the real one.

Instances are happening, and always have been happening, in which they unanimously concur in declaring as true that which all know to be untrue, and when out of the box scruple not to declare their believing to be untrue. Declaring a quantity of money stolen to be under a certain sum, when in fact what was stolen, if indeed it was stolen, could not have been less than several times that sum; declaring a defendant not guilty, when, according to ample, uncontradicted, and unquestioned evidence, he was guilty: in both cases, for the known and undissembled purpose of saving the defendant from the punishment appointed by law.

Under the eyes of the highest judges is always done what is thus done: judges never disapproving, oftentimes approving, commending, or even recommending. Not a judge is there of those now in office, to whom it is not perfectly known that all this is correctly true. When praise is bestowed by them, humanity is the word by which it is bestowed. Humanity displayed! by which laws are openly violated, and perjury openly committed!

2. In the case of coroners and coroners' juries, — as often as suicide is declared the result of insanity, when in fact it is the result of calculation — a calculation by which it is determined, that in what remains of life, if preserved, the quantity of pain will outweigh that of pleasure. The cases in which the operation is declared not to be the result of insanity are extremely rare. And then what are they? Those generally in which a man has left neither property nor friends, by whom his property, if any, at his decease could be shared. When the confidant of the Holy Alliance, so truly called holy (for what wickedness is equal to that called holiness?) put an end to his life, what he did was, as everybody knows, deliberate. If suicide is an act of insanity, so is voluntarily entering into a military service — so is choosing what appears the least of any two evils.

3. In the case of deodands imposed by coroners' inquests. When, by a loaded coach or waggon running over him, a man is killed, declaration must be made by them upon oath what the instrument was by which the casualty was produced. By the whole vehicle, or no part of it, says common sense. No, says jury and directing judge — not by the whole vehicle, but by one wheel and no more: by no other part was any contribution made towards the production of the effect. Here then, is perjury — and to what use? To save the owner of the carriage from the loss of it. For when, by the unruliness of his cattle, the husbandman has lost a servant or a son, — to enrich him for his loss, all-wise judges have in their wisdom concurred in giving it with its contents to the king. Wisdom, with one hand, enforces the law; the same wisdom, with the other hand, defeats it.

Now, as to belief, how stands the matter with these men? Is it that they do not believe that any such person as God is in existence? Is it that, believing such a person to exist, they do not believe that the power they thus take upon them to exercise over him will have its intended effect — they the judges to decree at pleasure, he the sheriff to execute?

They who into the mouths of the elect are so constantly occupied in forcing perjury, are they not suborners of it? But the thing to be proved was, that, whatever be the restraint in any case put upon the motives by which perjury is prompted, — in the production of this restraint no part is ever taken by the ceremony of the oath. And the proof is — what? Where it has not for its accompaniment exposure to punishment in a visible shape, it is set at naught by everybody; but by none more universally than by those to whom, in profession, it is the object of such prostrate reverence.

The all-embracing jury-trial perjury could no otherwise be got rid of, than by giving to the majority, as in other cases, the power of the whole: a measure, the effects of which could not without considerable reflection be anticipated.

But the madness-imputing perjury, and the valuation perjury might be got rid of, at no higher price than the mortification of suffering the property to go or remain with the right owner: and among the whole race of heroes, whom, in the character of ennobled chancellors and judges, the country has for so many ages been adorned with, not one has ever been found hero enough to take upon himself

this same mortifying task — by whom the benefit of clearing the country of this perjury has been thought worth the trouble.

When, by the whole elect of the country, the utter inefficacy of the ceremony has been recognised, it may seem little better than a superfluity to speak of the indirect recognition expressed by every House of Commons that ever sat. If it were thought of any importance that it should be employed in inquiries, in the result of which nothing more than the welfare of A and B is at stake, — could it ever have been left unemployed in inquiries, on the result of which so many millions are continually at stake? Could the Commons have quietly left the Lords in the exclusive possession of it? Could the Lords, temporal and spiritual, with common decency have kept to themselves the exclusive possession of it, if, for any such purpose, it had, in the opinion of either, been worth a straw?

So much for the uselessness and inefficaciousness of it. Now as to the mischievousness of it.

The prime article in the list of the evils produced by it, is the mendacity-licence, of which it has been, and continues to be, the instrument. To make men believe that it is by the imaginary eternal, and not by the real and temporal punishment, that the mendacity-restraining effect is produced (the House of Commons case excepted) on no occasion, for the repression of mendacity, is any real punishment employed, but when this ideal source of punishment is tacked on to it. Where no oath, on pretence of securing veracity, is employed, falsehood, though the evil consequences be exactly the same, receives the fullest and most effectual licence.

In the field of common law, with the fullest allowance from their partners in depredation, the judges — the hireling lawyers of all classes, on both sides, riot and disport themselves, while fattening upon lies. Beyond a certain extent, the quantity of these lies is optional; but up to that extent, it has, by those who profit by it, been made compulsory and unavoidable.

§ 11. *Before applicant's statement — responsibility how secured.*

Antecedently to the reception of the applicant's statement, the judge takes the requisite measures for securing the means of communicating with him after his departure from the judicatory, for whatsover purpose such communication may be requisite.

Needful, on two accounts, is this precautionary measure:—

1. On the account of the applicant himself, for the purpose of giving effect to his application, in the event of its proving well grounded.

2. On the account of the defendant, in the event of its proving ungrounded, with a view to compensation.

3. On the account of the public, in the event of its having been made wantonly, having for its object or effect the exclusion of other applicants from the benefit of justice, by wasteful employment of the judge's time.

First, then, let it be not a piece of information that the applicant comes to give, but a complaint, or a demand, that he comes to make.

In case of a complaint, he will set himself to inquire what the wrong is, which is the subject of it; and who the person is, or the persons are, who have been concerned, and in what ways, in the doing it: whether known to the applicant or unknown; if known, where the person's abode is, or what other more effectual means there may be of communicating with him for the purposes of the suit.

For the purpose of ascertaining what the wrong is, the judge will have before him the table of offences. It will be given in all its ramifications in the penal code, to which the proposed code here delineated has reference.

This table, with divers others, is constantly within reach of the judge, and within view of all the other actors in the judicial theatre. If the applicant can read, a look at it may enable him to save the time employed by the judge in the above-mentioned address. Frequently, while waiting in the suitors' gallery for his turn, a communication with his neighbours in the gallery, if carried on in whispers, at the intervals when the discourse carried on for the purpose of the suit are at a pause, may afford him such instruction as may more or less abridge the labours of the judge.

If the application be a complaint, the definition of the wrong will have informed the judge of the criminative circumstances, the concurrence of which is necessary to the existence of it. As need may occur, he will either mention these to the applicant, or wait to collect them from the applicant's statement, as it comes forth. And before he determines to call for the appearance of the defendant, he will, in like manner, satisfy himself that, according to the applicant's showing, no circumstances of justification or of exemption, relative to the species of offence in question, have had place.

If the application be, as above, a demand, the judge will of course have in his mind the respective natures of the several services capable of being demanded, without imputation of wrong, on the part of those at whose charge they are demanded: together with a list of all the several efficient causes of title, with respect to service in all those several shapes. This being confined to another such

Table as above, will at the same time afford to the applicant such information as the state of his mind enables him to imbibe.

In the same Table in which are exhibited the several incidents which, with reference to the sort of service in question, have a collative effect, will also be exhibited, in conjunction with them, the several circumstances which, with reference to that same object, may have an ablative effect.

The same care which has been employed in the ascertaining, so far as depends upon the applicant's showing, the existence of some one article in the list of collative circumstances, will be employed in ascertaining the non-existence of all the several ablative circumstances.

In the course of the inquiry, he will ascertain whether there be any other persons, who, not being present in the character of co-applicants, are united in interest with the applicant.

So also in regard to witnesses.

So likewise as to defendants, and persons regarded as capable of being witnesses, or liable to be called as witnesses, on the defendant's side.

It will then be for the determination of the judge, to which description of persons application should first be made — whether to the applicant's partners in interest, to the applicant's expected witnesses, or to the defendant or defendants. And in such his determination, he will of course be governed by the joint consideration of delay, vexation, and expense; regard being had to the importance of the case on the one hand, and the probable quantity of unavoidable vexation and expense on the other hand.

His next consideration will be, in which of the three possible modes application shall be made to the several descriptions of persons above mentioned — whether in the way of accersition, prehension, or epistolary mandate and interrogation.

§ 12. *Self-notificative information, elicited how.*

When the purpose of the application has been established, or, if he sees reason, earlier, the judge proceeds to establish the means of eventual communication with the applicant, according to the nature of the purpose.

Judge to Applicant: — Produce your applicant's address paper, ready filled up, or make answer to such questions as I shall have to put to you, for the purpose of filling up this which I have in my hand.

If, by the applicant, a paper ready filled up is produced accordingly, the judge, either by the word *allowed*, with the addition of his signature, signifies his satisfaction with it as it stands, or proceeds, and continues to put appropriate questions, until it receives his allowance, as above.

If no such ready-filled up paper be produced, the judge, by appropriate questions, proceeds to elicit answers, until, under the several heads, such information as to him appears satisfactory has been obtained — the registrar, under the direction of the judge, setting down the answers in words or substance, but not any of the questions — such alone excepted, if any, as he shall have been required to set down, either by the applicant or by the judge.

At this stage, the judge may content himself with the information expressed in such answers as the applicant is content to give. By the purpose of the application, and the nature of the matter stated in pursuance of it, he will be determined whether to elicit information under the several other heads.

In respect of name, all that at this stage need be elicited is that which the applicant is at the time known by, and answers to: so in regard to condition in life, and abode. Under no one of these heads will he be required to declare the real, in contradistinction to the apparent state of the case, unless specially required; nor will he be thereto specially required without special cause.

If the applicant's purpose be either consultative or evidence-securing, seldom can it happen that on his part any desire of concealing either name, occupation, or habitation, should have place: nor yet, if his purpose be calamity-damage-preventive, or delinquency-damage-preventive, can it naturally have place. Not so if the purpose be either contentious or informative. For in the case of a person by whom, on this or that point, and in particular in the point of name or condition in life, the law has been transgressed, need of the protection of the law for himself, together with adequate motives for furnishing information of acts of transgression committed by others, may not be the less likely to have place.

§ 13. *Applicant's accessibility secured, how.*

In regard to habitation, if so it is that the applicant has not any such settled habitation as determined in and by the Constitutional Code, in the chapter containing the Election Code (viz. Ch. VI.) no entry, without instruction from the judge, will he perhaps be able to dictate.

In this case, either he has a habitation in the territory of some other judicatory, or he has not any in the territory of the state. If he has not any in the territory of the state, either he has not any at all anywhere, or he has a habitation in the territory of some foreign state. Whether in the territory of a foreign state he has or has not any such

habitation, — in the territory of the judicatory in which he is making his application, either he has a temporary residence, or he is merely passing through it in the course of a journey, in the condition of a traveller. In which of all these several predicaments the applicant stands, the judge will, by appropriate inquiry, learn, and accordingly cause entry to be made.

For the purpose of maintaining appropriate intercourse with the applicant, it will not be necessary that his habitation (if in the territory of the judicatory, or elsewhere, he has any) should be known; it may be maintained by missives deposited at the habitation of any other person, or at any other place, at which, by his own hands, or those of any other persons, he declares himself sure of receiving it.

In general, only in the case where consequential proceedings are in contemplation to be carried on, will there be any need of establishing any means of intercourse. No such need will have place if the application be simply dismissed, unless, on the ground of delinquency, in some determinate shape, or for security to other persons against damage liable to be produced by the application, it should be deemed necessary to place him in a state of forthcomingness.

The case where the purpose of the application is contentious, and in consequence a suit will naturally have place, being that in which the importance of accessibility is at the maximum, as also the difficulty of securing it, — what belongs to this head will be found in its proper place.

§ 14. *Causes for dismissal.*

Causes or grounds for dismissal, may be any one of the following:—

1. To warrant the judge, in rendering the judicial service necessary to the performance of the service demanded, no adequate portion of law indicated by the pursuer, or existing, to the knowledge of the judge. Say for shortness — Law not proved.

2. No fact alleged by which, supposing the existence of it proved, the title or right of the demandant to receive the service demanded would be established. Say for shortness — Fact not proved.

3. The evil, if any, that has place or would have place, supposing the effectual service not rendered, not sufficiently great to outweigh the evil, which, in the shape of vexation and expense, would be produced, by rendering it.

4. The applicant not able of himself to furnish adequate satisfaction, in any shape or shapes, to the proposed defendant.

5. The evil, if any, not sufficiently great to warrant the exacting, at the hands of the demandant, the self-incarcerative security.

6. No person indicated by the demandant, as consenting eventually to subject himself to the burthen of satisfaction to an amount sufficient to outweigh the evil of vexation and expense, as above.

§ 15. *Proceedings, when secret.*

If, in the apprehension of the applicant, the case be of the number of those in which, for some specific purpose, secresy, in reference to the other actors on the judicial theatre should for the time be preserved, he hands over to the judge a folded ticket, in which the demand for secresy, together with the ground of it is expressed: whereupon the judge will as he sees best, either continue the hearing in the public chamber, or transfer it immediately to the private chamber, taking with him the applicant and the officiating registrar.

Grounds for such secresy are as follows:—

1. On the part of the proposed defendant, danger of non-forthcomingness, if the application be known to him.

2. So on the part of a desired witness.

3. So, on the part of a proposed defendant, — abstraction of things moveable, to avoid eventual prehension, whether for means of probation, or for means of execution.

4. Necessity or probability of disclosures productive of damage to reputation in respect of sexual intercourse.

5. Necessity or probability of discourse offensive to modesty.

6. Necessity or probability of the revelation of facts, the disclosure of which might be prejudicial to the community in respect of its foreign relations.

So, if, in the course of the conversation, he sees reason, the judge will transfer the hearing from the public to the private chamber, having care to retransfer it to the public chamber, so soon as the need of secresy has no longer place; and so *toties quoties*.

If, by a party on either side, demand be made for a *recapitulatory inquiry*, secresy or publicity may again be demanded, by that same or any other party, on either side; thereupon the judge will do as he sees best, taking care lest, intentionally or unintentionally, secresy be broken in the course of the demand.

If, in the case of secresy, on the ground of damage to reputation, the injunction of the judge be broken, the offender will be responsible — satisfactorily and punitionally responsible — as for malice or temerity, as the case may be: and the truth of the imputation, will not be received either in justification or extenuation.

§ 16. *Deceptive fallaciousness — its modes.*

Falsity essential, falsity in circumstances, falsity in degree, falsity irrelevant. The distinctions expressed by these appellations will be noted by the judge.

By falsity essential, understand the case in which, supposing the assertion false, the claim of the applicant falls to the ground. Examples:—

1. Where the subject of demand is money, on the ground of common debt.

2. Subject of demand—delivery of an individual thing, moveable or immoveable, simple or aggregate.

3. Subject of demand — money in satisfaction for a wrong, by the offence of simple corporeal vexation.

4. Subject of demand or of application — informative; publico-private wrong, by theft.

For modes of fallaciousness, other than falsity, see the Book of Fallacies.

Included in such fallaciousness, is irrelevancy—irrelevancy of evidence delivered in relation to the fact properly in question.

Falsity (when not irrelevant) is either completely contradictory to the truth, or incompletely contradictory to the truth.

Falsehood which is incompletely contradictory to the truth, is so either in degree or in circumstance.

By falsity in circumstance, understand the case in which, in respect of some circumstances, the statement appears to be false; but deducting the falsity, enough remains to warrant the judicial call upon the parties.

Example: Where, from the terms of the charge, it appears, whether from self contradiction on the part of the applicant, or from some generally notorious fact, either not known to him or not heeded by him, that the material act stated by him, if indeed it happened, did not happen at the *time* stated, or at the *place* stated, or that a person stated as present was not present.

By falsity in degree, understand the case in which, though, in the degree stated by the applicant, the result of the act stated by the applicant did not take place, or could not have taken place, it might, nevertheless, for aught appears, have had place in a degree sufficient to warrant the proposed call upon the pursuer. In this case, the falsity takes the name of exaggeration.

Example 1. In case of debt for goods sold, value as stated, so much; real value, not more than half as much.

2. Amount of the money constituting an equivalent, or satisfaction for damage sustained by goods, from ill-will or negligence, so much; real amount, not more than half as much.

From the amount of the exaggeration, with or without other circumstances, a judgment may be formed, whether it was the result of blameless error, of rash judgment and assertion, of insincerity or mendacity.

By falsity irrelevant, understand the case, where, though the assertion be tainted with falsity, the falsity is such, that, supposing the other parts of the statement true, the ground of the application will not be the less valid. In this case, it may be either blameless, temeracious, insincere, or mendacious. However completely soever irrelevant, it may still be not the less fit to be noted, as well for the purpose of the principal suit, as affecting the trustworthiness of the application, as opposed to any statements by a defendant, as for the purpose of constituting a ground for punishment.

The effect is of a particular kind, where the subject-matter of the deception, or the attempt, being a thing or a person, the erroneous opinion caused, or endeavoured to be caused, is identity with reference to a certain thing or person, wherein diversity is what really has place. As where a thing being the subject-matter, an appearance is put upon it by the deceiver, with the intent, that in relation to it an opinion should be formed, that the cause of its wearing that appearance was and is the agency, not of him the deceiver, or would-be deceiver, but either of some other person, or of unassisted nature. When the subject-matter is an assemblage of the visible signs of discourse, the attempt thus to deceive — the preparation made for deception — by a person (whose writing the discourse does contain,) with the intent that it shall pass as the work of some person other than him the deceiver whose work it really is, — is styled forgery — to wit, of written evidence: when the signs are of any other nature, the forbidden act may by analogy be still termed forgery, but in this case, forgery of real evidence.

In the Greek language, without difficulty, and in the English, if a word imported from the Greek language could be endured, it might be termed *prometamorphosis*, by analogy to metamorphosis.

False in degree. This may be converted into truth, by simple addition or subtraction.

False in circumstance. Circumstances are, with relation to the principal part of the matter of fact, either essential or unessential: essential *in* place and *time* — essential in *some place* and *some time* — because no matter of fact can have existed, without existing in some place, and in some time; — but it may be, that neither the individual place, nor the individual time alleged, may have been essential and necessary to the material effect of the principal fact in question.

Histories of trials, if well analyzed in this view, will be of great use in furnishing the mind with ideas of cases applicable on each individual occasion. But general rules, exercising an absolute dominion over decision, should not be made out of them.

Susannah's elders were deemed false witnesses, because, according to what one of

them said, the act was committed under a tree of one sort, — according to the other, it was committed under a tree of another sort. But what if the trees were so placed, that it was committed under both of them? — or, if the animated act, being so much more interesting than the inanimate vegetable, one or both of them had, for want of the necessary appropriate attention, been mistaken as to the tree?

§ 17. *Justice-obstructing application obviated.*

On every occasion on which it appears to the judge that the application is groundless and frivolous, he will make declaration to that effect. If, in his opinion, the cause of it be want of due consideration for the value of the time of the judge and the judicatory to the public service, but without consciousness of its groundlessness, he will declare it culpable; and, for the purpose of determent in future, he will impose a small mulct. If, in his opinion, the cause of it be a desire to pre-occupy and employ in waste the time of the judicatory, for the express purpose of producing delay in reference to other suits in general, or a certain suit or set of suits in particular, (in which case, it cannot but be accompanied with evil consciousness,) he will make declaration to that effect, and declare the application groundless and criminal, and impose upon the applicant a much heavier mulct.

The produce of the mulct will in both cases be allotted to the helpless litigants' fund.

In ordinary practice, no person is admitted to apply for justice, without payment of money under the name of fee. The consequence is, a denial of justice to all those who are unable to pay the fee; and in the case of those who can and do pay it, but can ill afford it, adding hardship to injury — injury by the hand of government, to injury by the hand of the individual wrong-doer. By this means, the government offers encouragement to wrong; in the way here proposed, a pecuniary exaction will act as a discouragement to wrong.

If in consequence of divers instances of groundless application, one with another, it shall have appeared to the judge, that among the applicants or any of them, concert for the production of delay as above — vexation to the judge and judicatory — have place, he will declare as much, and give to the aggregate of such applications the appellation of a *conspiracy* — a conspiracy for the obstruction of justice; and in proportion to their respective pecuniary circumstances, give increase to the amount of the mulct respectively imposed upon them. Thus there will be so many distinguishable offences against justice — modifications of the offence denominated *obstruction of justice* — 1. Obstruction culpable, through rashness; 2. Obstruction criminal, accompanied with evil consciousness; and, 3. Obstruction criminal, accompanied with evil consciousness and conspiracy.

To the government advocate it will belong to be upon the watch for every such instance of obstruction to justice, and to make demand accordingly for the infliction of the mulct.

So likewise to the eleemosynary advocate, in default of, or at the request, or with the consent of, the government advocate, and with the consent of the judge.

Were it not for this means of repression, nothing would be easier than for a knot of men, — to whose particular and sinister interest the system of natural procedure, on this or that application expected to be made, were detrimental, — to stop the course of justice altogether, and throw everything into confusion: in consequence of which, the only system of procedure conducive to justice, would wear the appearance of being destructive of it.

At the expense of a reward, exceeding, though it were by no more than a small amount, the daily wages of the lowest paid labourer, thousands might be procured in such sort as to occupy for years with groundless applications, the whole quantity of judicial aptitude that could be brought into operation.

§ 18. *Application by a party to a quarrel; or say, Quarrels, how terminated.*

An occurrence naturally not unfrequent is this. Between an applicant and a party complained of, a series of supposed wrongs on both sides have had place. In a case of this sort, if, on the occasion of the application made on one side, the judicial service due be rendered to the applicant, no notice being at the same time taken of any wrong done by him to the proposed defendant, justice would be rendered in appearance, in reality not.

As to the multitude of the individual instances of wrong in its several shapes, capable of being done by one individual to another, there is no determinable limit; still less can there be to that of the instances of wrong on both sides. Of no one alleged wrong can the judge refuse to take cognizance, any more than of any other. Whatever in any particular instance may be the number, if on the day of the first application made by the party, cognizance be taken of the whole series, judgment may be pronounced on every one of them on that same day; whereas, if separate days be appointed for each, no limit can be assigned to the quantity of delay which may have place — delay to the suitor, with correspondent needless expenditure of the time of the several actors on the judicial theatre.

This considered, when, in consequence of application made — the applicant is received

as pursuer, and the party complained of, as proposed defendant, such proposed defendant appearing — if so it be that, by such defendant, wrong in any determinate shape is by him alleged to have been done to him by the pursuer, — the judge, far from inhibiting such counter-complaint, will rather give encouragement to the exhibition of complaints on both sides; to the end that, in so far as practicable, termination may be put to all feeling of ill-will on both sides, to all resentment for wrong sustained, to all apprehension of wrong about to be sustained on either side — in a word, that perfect *reconciliation* be effected.

In this case, the damage, in whatever shape, from every wrong on each side, will operate as a set-off to every other; an account, as complete as may be, will be taken of what is due on each side; and a balance struck, and payment, in whatsoever may be the appropriate shape or shapes, made accordingly. In the case of an ordinary account of a commercial nature, this is matter of universal practice; in the case here supposed, it may with equal facility have place: a sum of money, due on the score of satisfaction for corporeal vexation, may with as much propriety and facility be set down in account, as money due on the score of ordinary debt; and for wrongs on either side or on both sides, satisfaction in a shape other than pecuniary may be remitted on one side, in consideration of satisfaction remitted on the other.

But though it should happen, that for mutual wrongs in any number, nothing in the name of satisfaction in any shape be found due on either side to either individual, — wrong to no inconsiderable amount may in this way have been done by one or both parties to the public — wrong, that is to say, by the consumption made of the judicial time as above.

Upon the whole, then, two distinguishable courses may, on any such occasion, require to be taken — two distinguishable functions require to be exercised by the judge; that is to say — 1*st*, the conciliative; 2*d*, the punitive.

To the conciliative he will, to the best of his endeavour, give exercise in every case; to the punitive, at the charge of either or both, if, and in so far as, the circumstances of the individual case appear to him to require.

The increased faculty of extinguishing ill-will, and at the same time rendering complete justice, as between any two or any greater number of persons regarding themselves as wronged, is among the advantages possessed by the system of natural procedure, in comparison of the system of technical procedure — by the proposed system, in comparison of the existing system.

Under the existing system, the impossibility of any such comprehensive and desirable arrangement is entire. Two causes, not to speak of others, concur in the production of it. A judicial meeting of the parties themselves there is none; and the expense of a single suit to the comparatively few who possess the possibility of defraying it, is so enormous as to destroy either the will or the power — or the will and power necessary to the engaging in so much as a single additional one.

By so simple an arrangement as that of the judicial meeting of the parties, in Denmark, under the judicatories called Reconciliation Courts, from two-thirds to three-fourths were struck out of the number of the suits carried before the judicatories acting under the technical system. This, too, under a host of disadvantages, of one of which the bare mention may seem to render unnecessary all mention of the rest: — no power had this judicatory to give execution and effect to its own decisions.

If, under such disadvantages, success was thus extensive, what may it not be expected to be, under a judiciary and procedure system possessing, in a degree so high above everything as yet exemplified, the power as well as the inducement to discover and ascertain what, on each occasion, ought to be done, and when ascertained, the power of causing it to be done?

To receive in no case a counter-demand as a set-off to a demand, would, on the part of the common-law courts, have been an injustice not to be endurable. What remained was to render the field of the application as limited as possible — as limited, and thence as indeterminate. For thereupon came the point, whether, in case of the demand in question, a counter-demand to the effect in question should be allowed. But unless it was on account of the delay with which the elicitation of the evidence in support of the counter demand would be attended, — if, in any one case a counter-demand is allowed, why not in every other?

§ 19. *Parties' forthcomingness.*

The judge will have the faculty of exacting at the charge of a person adequate sureties, against whom it is in contemplation to prefer a demand (and who, it is apprehended, is on the eve of departure from the country in question, to some spot not accessible, immediately or unimmediately,) to the powers of the judicatory, to the purpose of effectual justiciability in relation to such demand.

In English law, example of a suit having for its object the securing the forthcomingness of a person for the purpose of justiciability, — the writ, *ne exeat regno*.

Here the applicability of the remedy falls extremely short of the demand, in respect of its extent over the field of law and judicature; neither is it afforded to any person

who is not at once able and willing to buy it of the judge and his partners in trade, at the expense of the most expensive sort of suit — a suit in equity.

§ 20. *English Practice.*

Against that system of depredation and oppression, of which law, substantive and adjective — more immediately substantive — is the instrument, and Judge and Co. the self-paid and richly-paid authors, the security that will be seen to be given by those two so intimately conjoined arrangements, viz. the appearance of the parties, and their responsibility in case of mendacity, will upon a detached view be seen to be such, as no person who had not applied himself to the subject with close attention for this particular purpose, could, in the nature of the case, imagine to himself.

Of this same most flagitious system, the arrangements correspondent and apposite to the tutelary one, form the two main points.

By keeping the door of the justice-chamber inexorably shut against parties on both sides, and particularly against those on the pursuer's side, the partnership forced under this one head, every person who, on either side of the suit, felt himself compelled to take this melancholy chance for that essentially adequate relief, which was to be sold under the name of justice.

For shortness, call this principle, the deaf-adder principle, or the judicial-deafness principle.

By confining to extraneous witnesses such security as they find it necessary to afford against judicial falsehood, the giving full swing to it to persons in the character of suitors. They thereby let into their net the whole tribe of insincere litigants on both sides of the case: all those who, for the purpose of depredation or oppression in any other shape, could, by the facility thus afforded, be content to purchase their official and most efficient instrumentality and support: to give effect to demands, known to be groundless, and by delay for an indefinite length of time, obtain a proportionable chance for ultimately defeating demands known to be well-grounded

Here, then, was an immense addition to the greatest number of customers they could have hoped for under any system which had for its object the ends of justice. For addition, say rather multiplication, — multiplication, and by a high power.

At one sweep, it gathered into the net, amongst others, the whole tribe of dishonest debtors; that is to say, of such debtors as by this encouragement they could succeed in rendering dishonest.

Call this principle the *mendacity-licence* principle, or for shortness, the mendacity-licence. Further on it will be seen improved into a perjury-licence, that encouragement to vice in this all-comprehensively-mischievous form might not be wanting to any class of human beings.

Calling it simply a licence, is not doing justice to it — is not yet painting it in its genuine colours; for when depredation is the object of licence, licence contains in itself the essence of reward.

This was not yet enough: it was almost enough for those who acted in the name of law; it was not enough for those who, as if to give a zest to profligacy, acted in, and prostituted the name of equity. It was almost enough for law; it was not enough for equity.

Not content with encouraging falsehood, they forced men into it. As to the matter of falsehood, common lawyers just contented themselves with vague quantities: false assertions on both sides — falsehood in the initiatory demand — falsehood in the initiatory defence — false declaration — and false plea: all this, however, is in a comparatively small number of words, with comparative moderateness of depredator's profit.

In the race of profligacy, not inconsiderable is the advance thus made by Common Law; but in this part of the case, as in so many others, she was left behind by Equity.

If a man owe you money, the Lord Chancellor Eldon will do, what the Lord Chief-justice Abbott will not do. He will let you ask the man whether he does not owe you the money, and whether, of the facts by which the debt was produced, the statement you make is not true. Think not, however, that an indulgence so extraordinary is to be obtained without cost. Before you can be admitted to set foot, and that only by proxy, in the temple of Equity, your honour at any rate, whatever part of it consists in abstinence from lying — deliberate and elaborate lying — must be left at the threshold. If the statement of a matter of fact, concerning which you are in ignorance, be necessary to the establishment of your right, being permissioned by equity to call for information at your debtor's side,—how would you go about it? Would you ask him at once how the matter stands? No such thing will you do, if, on this occasion, your lawyers know their business; for in this way you might ask long enough, before anybody would give you an answer. No: you must come out with a string of lies first, and no otherwise than on that condition will your debtor receive orders to furnish the information and acknowledgment which you have need of at his hands. The very thing which you do not know, and which to the Master of Equity it is known that you do not know, by his instrument, the Master in Chancery, he forces you to declare solemnly that you do know, stating the particulars of it in detail; your lawyer, the attorney

called a solicitor, and the barrister draughtsman, consulting their imagination, and weaving a tissue of falsehood for the purpose. This falsehood has its equity name, and is called the *charge;* and the maxim is — every *interrogatory* must have for its support a correspondent *charge*.

Here, then, are so many more words to be paid for — paid for at so much a dozen, — paid for, over and over again, to so many different persons — judges, solicitor, draughtsman, Master in Chancery, Master in Chancery's creatures, — all of them having, in one way or other, a finger in the pie.

In a more refined, but not the less substantial shape, another mass of profit is yet behind. Of the profit thus reaped from falsehood, the continuance could not but be, in a more or less considerable degree, dependent on the degree of acquiescence on the part of those upon whom, and at whose expense, it is practised. But no sooner were it seen in its true colours, than those at whose expense it was practised, would of course, as far as the law millstone about their neck would admit of their doing, rise up and protest, with one voice, against the vice thus crammed into their mouths, while their pockets were being thus drained.

At the bottom of the system has accordingly always been, so to order matters as that right and wrong, morality and immorality, should be regarded as depending, not upon the effects produced by them respectively on human happiness, but on the oracles from time to time delivered, as occasion called — delivered by these arbiters of their destiny, by these masters of their fate: accordingly, in particular, that falsehood, when forbidden by them, or without being so much as forbidden, punished by them, was wrong; but that the same, or any other falsehood, as often as it was left by them unpunished, became a matter of indifference, and as often as commanded by them — not only right, but obligatory.

With how deplorable a degree of success this has been crowned, the whole community feels but too much unquestionably. In how complete a state of confusion has the most intelligent of nations, for so many centuries, remained! — insensible to the most marked boundary line that distinguishes vice from virtue: swallowing lies upon lies, and bowing down, with unabatable reverence, before the men who force them into their mouths! — absurdity and nonsense, both in the superlative degree, worshipped under the name of learning — vice, in its most sordid form, under the name of virtue!

All this while, of the object of this worship, what there has been in reality is — opulence in league with power. Nor yet has learning been altogether wanting to it. — Learning? but of what sort? Of that which consists in an acquaintance, more or less familiar, with an enormous and ever-swelling mass of absurdity and nonsense. Could but the head be emptied at once of the whole mass, it would be but so much nearer to the being furnished with real and useful knowledge — with that sort of matter, in the denomination of which the word learning can without profanation be applied.

By the opening of the door to all applicants, whose wish it is to obtain, on their own account, the benefit of judicial service, two opposite but correspondent and concurring effects are produced, according to the character of the applicant. On the one hand, to all sincere applicants, an advantage — an advantage, in respect of its extent altogether unprecedented, is secured: on the other hand, to persons at large, against the machinations of insincere litigants, a security alike unprecedented is afforded. On no occasion can any person expose another, in the situation of defendant, to the vexation and danger incident to this situation, without affording to his adversary that security against injustice, which is afforded by the applicant's thus placing himself in a situation of effectual responsibility, satisfactional and punitional, in the event of the application being regarded as not sufficiently grounded.

CHAPTER IX.

PROXIES.

§ 1. *Proxies, when and who.*

EXCEPTIONS excepted, no suit can be commenced but by application of the individual who demands to be received as pursuer.

The reasons are given in another place, where it is shown what the services are which are rendered to justice, by the attendance paid, and examination taken, of the proposed pursuer; and that without such his attendance, cannot be rendered with anything near to equal benefit.

Exceptions are the following:—

1. Temporary infirmity of body. Where the health of the party will not admit of his quitting his own residence, and the commencement of the suit cannot, without danger of non-execution on the part of the law, await his recovery.

2. Party's infirmity, by temporary or permanent mental derangement.

3. Party's infirmity, by caducity.

4. Party's infirmity, by nonage.

5. The party being temporarily absent, and the efficient cause of the demand has taken place since his departure: nor is his residence in the territory of any judicatory in which the suit could be commenced with equal advantage to justice.

In cases 1, 2, 3, or 4: Although, in any

one of the above cases, the judge may receive a proxy, instead of a party, and, upon the evidence exhibited by the proxy, order the reception of the principal, in the capacity of the pursuer, the judge may, at the first hearing as above, or at any time thereafter, require, by appropriate mandate, the attendance of the party, either with or without the co-attendance of the proxy — to wit, by an attendance-requiring mandate, directed to the proxy and the party jointly.

In case **5**, he will, if he sees reason, direct an appropriate suit-transmitting mandate, and have the option following: —

1. To dismiss the suit simply.

2. To retain it, advising, at the same time, the pursuer to carry his demand before another judicatory, that, to wit, within the territory of which the residence of the proposed defendant happens to be at the time.

3. Constitute the applicant the party's proxy, and, from the evidence adduced by him, in conjunction with the demand paper, commence the examination of co-pursuer's or defendant's evidence-holders, in the epistolary mode.

§ 2. *Litigational proxies.*

A litigational proxy is a person who, on the occasion of a suit, acts in the service of a party litigant, on either side of the suit; the party in whose service he acts not being present.

Such proxy is either a professional proxy, or a non-professional proxy: professional, serving for pay.

As a professional proxy, no person can be admitted to serve, who has not been duly located in the situation of professional lawyer, or, for shortness, say *lawyer*: as per Constitutional Code.

So likewise in cases inculpative or not, but not criminative.

So likewise in a suit criminative and purely public, to the purpose of subjecting the principal to a punishment no other than pecuniary.

So likewise in a suit criminative and publico-private, to the purpose of subjecting the principal to the burthen of compensation, with or without pecuniary punishment; but not to punishment other than pecuniary.

So likewise as to consent given by the proxy, on behalf of the principal, to any operation on the part of the judge, by him proposed.

So likewise in a simply requisitive case.

So likewise in a suit criminative and publico-private. But in this case, the government advocate, or public pursuer, will have care, lest by this means, of the suffering proper to be inflicted on the score of punishment, undue diminution have place: and may propose to the judge to make addition, in a pecuniary shape, to the punishment, in lieu of any pecuniary compensation, the remission of which may have been produced by such admission or consent on the part of the proxy.

A party defendant may apply for relief against an admission alleged by him to have been unwarrantably made, to his prejudice, by his proxy: to wit, for the purpose of being put (in so far as without preponderant inconvenience may be) in the same state as that in which he would have been, if no such admission had been made.

But then, except in case of valid excuse for non-attendance, he cannot do so otherwise than by repairing himself to the judicatory, and submitting himself to confrontation with the proxy, at the justice-chamber, for the purpose of their being interrogated by each other, and by the judge.

It will be among the cares of the judge, that from such disavowal on the part of the principal, damage in any shape shall not be made to fall upon a party on the opposite side of the suit; and that whatever expense may have been produced by it shall fall upon the principal, the proxy, or both, rather than upon any party on the other side; and in this view, he will be on his guard against collusion between them, for the purpose of addition intended to be made to delay, expense, or vexation, at the charge of the other side.

In a simply requisitive case and suit, the principal is provisionally bound by the admission of a professional proxy.

So by the admission of a non-professional proxy.

In either case, the judge, in case of apprehension on his part, lest by an admission made by the proxy, the interest of justice, as well as that of the principal, has been disserved, will state such apprehension, with liberty to the proxy to retract or modify such admissions, if he can consistently do so without prejudice to truth.

So, if he sees necessary, the judge, for reason assigned, may suspend any such operation as, on the supposition of the propriety of the admission, he would have performed, until information of the objection made to the admission has been transmitted to the principal, and response has been received from him in consequence, or time sufficient for the reception of such response has elapsed.

To hired lawyers, in the character of litigational proxies, shall admittance be given or denied? Given, of necessity, and beyond doubt. Preferable on several accounts, under certain conditions, are gratuitous proxies — But among would-be pursuers, many there will always be, to whom the finding any person, at the same time able and willing to give commencement and conclusion to a species of service capable of becoming so toilsome, would be utterly impossible. If, then,

proxies in adequate numbers could not be found, who, for such remuneration as they found obtainable, were willing to furnish, for the purpose in question, the sort of service in question — the whole class of persons above mentioned would be exposed to wrong in all shapes at the hands of every evil doer by whom, according to his calculation, the profit extracted from the wrong would afford him a sufficient remuneration for his trouble. Thereupon comes another question: A man by whom the service in question has on this or that occasion been rendered, upon a gratuitous footing, to this or that individual, — shall it be allowed to him to receive payment for it in the case of this or that other? Here the proper answer presents itself on the negative side.

In the Constitutional Code, the case of the professional class of lawyers is brought to view, and provision made for securing on their part, by a course of observation and practice, what seemed requisite of appropriate aptitude. If, without distinction, others, by whom no such security had been afforded, are permitted to enter into competition with them, the adequate inducement for engaging in a course of labours of such duration would not be afforded, and the burthen of affording this security would not find any person disposed to take it upon his shoulders.

It may indeed be said, that merit could find its way in the case of this, as well as other arts; the degree of proficiency on the part of each man would be evidenced by his conduct. True: to some it would; but to others it would not. Those to whom it would be evidenced would, with little addition, be the better educated inhabitants of the town, of that town alone, in which the judicatory had its seat. The rest of the inhabitants would, on each occasion, be at a loss to whom to intrust their respective interests, and would be liable to be taken possession of, as it were, by the boldest and most artful intruder.

The function of law practitioner, or say litigant's proxy, is but one of two functions — nor that the most important one for which the services capable of being rendered by the class of men in question are needed. Besides the case in which it is only to individuals that the service is rendered, there are two official situations in which the need applies: 1. That of judiciary visitors for the three first of the five probative years; 2. That same situation, alternating with that of advocate of the helpless. True it is, that in the first of these characters they will not serve any otherwise than on occasions when waiting in company with their respective clients to be heard: equally true it is, that but for the preference expected to be obtained, after this long term of study and probation, scarce any one of them would be found to subject himself to it.

By what means shall security be given to the exclusive faculty thus proposed to be established? To an extent sufficient for every beneficial purpose, in this there will be no great difficulty. To exclude altogether from the advantage of receiving, in this or that individual shape, a benefit in return for the benefit conferred by this laborious and important service, will neither be possible nor desirable.

Whatsoever had been the value of the contribution received by the contraband trader in judicial service, let him be subjected to the obligation of refunding it, with a certain proportionable addition to it, in the way of penalty. Individually and collectively, the body of professionals would find inducement adequate to the purpose of securing, in the case of each individual, a pursuer able and willing to carry the suit on to its termination. As to evidence, that part which regarded the proof of the services rendered by the interloper would be matter of notoriety: remains the contraventional fact — the act of receiving retribution in some shape or other for the service performed. But under a rational system, in regard to evidence on this score, never would there be any difficulty: without the least reserve (under the universally-applying security against mendacity,) questions would be put to all persons cognizant. Under the check afforded by this security, small does the probability seem of infringements of this prohibitive arrangement, in any such degree of frequency as to frustrate the intended exclusive privilege.

Only in case of a regular and permanent contraband practice, carried on by interlopers in numbers, could the damage done to the licentiates taken in the aggregate be considerable; and under the influence of the here-proposed remedy, any such permanent contraband trade, carried on by any individual, for any considerable length of time, presents itself as impossible.

§ 3. *Of damage-preventive application, by uncommissioned proxies.*

An application may be made either with or without authority from the person or persons on whose behalf it is made.

If it be without authority, a *self-constituted proxy* is the appellation by which, in this case, the applicant is denominated.

A self-constituted *benevolent* proxy, is the appellation by which he will be designated, if, in the opinion of the judge, the desire of serving the interest of the party, on whose behalf the application is made, constituted the whole or the main part of the inducement by which the application was produced.

§ 4. *Unauthorized proxies receivable, how.*

A self-constituted benevolent representa-

tive of an unrepresented absentee. By an unrepresented absentee, on this occasion, understand a person by whom an article or mass his property has been left, or is supposed to have been left, unoccupied: no assignable person being known, or supposed, to have been left in charge of it.

In relation to this case, provision in considerable detail is made in Bonaparte's Civil Code. In the English system, no notice whatever is anywhere taken of it.

Whatsoever judicial service a person has a right to demand and obtain for himself, or on commission from another, for that other, he has a right to demand and obtain for another, without commission, from that other, on his finding adequate security for appropriate responsibility, for compensation in case of damage.

The parties to whom damage from such benevolent intervention is liable to accrue are — 1. The principal, on whose behalf the application is made; 2. Any person, in the character of defendant, at whose charge the powers, the exercise of which is demanded at the hands of the judge, will have to be exercised.

In the account of this eventual damage will be included any costs with which any proceeding had in consequence, may happen to be attended.

In so far as ascertained, the amount of every such cost may require to be advanced by the applicant, instead of its being imposed on any other person, to whom, in consequence of the application, communication may require to be made; especially if judiciary attendance or transmission of documents to the judicatory may be requisite.

Whatsoever may have been the inducement, it will be among the cares of the judge so to order matters, that to no person, other than the applicant, damages in any shape may ensue.

Accordingly, exceptions excepted, the judge will not subject any person, other than such self-constituted proxy, to any expense of which the application may be productive.

Exception is, when, from the result of the application, benefit in any shape ensues to the party in whose behalf the application is made; while, at the same time, either no benefit at all would have accrued to him, or no benefit so great as that which has accrued to him by this means. In this case, reward in consideration of, and in proportion to the net value of the benefit so reaped from his service, may, in case of a suit instituted for that purpose, be decreed to the applicant by the judge.

CHAPTER X.

JUDICIAL COMMUNICATION.

§ 1. *Subject-matters of communication.*

COMMUNICATION. — By this name is designated an operation which bears reference to, and is a necessary concomitant to, all those others, and of which, on that account, no mention could have been made, till those others had been brought to view.

They, being so many distinguishable ends of procedure, it is, with reference to every one of them, a necessary means: communication, for the purpose of application and judication; communication for the purpose of probation.

Not to secure it, from the very outset of the suit to the very last act in it, on every occasion (and as between whatsoever persons and things, where the existence of it is necessary to the attainment of the ends of justice,) is a flagrant oversight. But should it be found, that for this omission, gold in torrents has at all times flowed into the coffers of those in whose hands the power was of preventing the deficiency, is is it to any such cause as oversight that, consistently with the most ordinary degree of discernment, it can be ascribed?

In Bonaparte's code, no such flagrant omission has place. Not that the means provided are, in so perfect a degree as they might have been, adequate to the end; but towards the attainment of it, no inconsiderable advance has there been made.

Among the earliest and most anxious cares of the system to which expression is given in this code, and those connected with it, is to secure, from first to last, the existence and efficacy of an instrument so indispensable in the work of justice.

Upon the degree of civilization, and improvement in various other respects, but more particularly in the state of the physical channels of communication (the roads by land and water,) must communication for judicial purposes, in respect of promptitude, celerity, and cheapness, of course be in a great measure dependent.

Persons and *Things*. — On this occasion, as on most others that present themselves on the field of government, — in these two appellations may be seen the results of a division, of which the nature of the case renders it necessary to make use.

Of this division, both members require a further division, into *common* and *peculiar*.

As for other purposes, in all imaginable variety — domestic, and other social and sympathetic intercourse — trade, wholesale and retail, and the business of the several departments and sub-departments in the offi-

cial establishment, so for this in particular,— the common, one great aggregate instrument of communication is the letter-post establishment, and the aggregate of the several stocks provided for the conveyance of large and heavy burthens, — including the roads, solid and fluid, over and through which the several masses of matter are conveyed, and the beasts, or other instruments of conveyance, by which the requisite motion and direction are produced.

By peculiar, understand those instruments of communication, the use of which is appropriated exclusively to the service of the department here in question.

§ 2. *Modes of communication.*

Communication is *from persons* only; from persons, it may be, either with persons or with things, or with both. From persons to persons, it may be either unilateral or reciprocal. Reciprocal it is, when in consequence of a communication made to a person, another communication is made from that person, to him from whom the first communication came. From a person to a person, communication is made in two different modes: the oral (the only original mode,) and the written. When it is the oral that is employed, the intercommunicants are necessarily, in that respect at least, present to each other: when it is the written, it happens sometimes that they are present, and that, notwithstanding such presence, there may be some special reason for their communicating with each other in that mode; but, in the ordinary state of things, they are at a distance. In this case, if it is in the written mode that the communication is effected, it is termed the epistolary mode: if the mode be not epistolary, the intervention of a third person is necessary; and, in this case, two communications instead of one have place — namely, one from the primary communicator to the third person, who in this case becomes an instrument of communication between them — another from the instrument of communication to the person to whom the communication is made.

Of all modes of communication, the simplest is that which is made in the oral mode, without the intervention of any such third person as above: in that most simple form, communication is cotemporaneous and coincident at the same time with the abovementioned mutually and necessarily cotemporaneous and coincident operations; that is to say, application, judication, and probation. In this case, the occasions for communication lie, as hath been seen, within a narrow compass.

Not so when the applicant, or the person who at his instance has been constituted the proposed defendant, or any non-party, or say, non-litigant evidence-holder, is called in. Now then comes the necessity for some instrument of communication, an instrument which, unless in some rare case, will be of the personal kind — in a word, some person to whom, in the character of a messenger, it belongs to convey the subject-matter of communication, most commonly of that real class, of which written discourse is composed, from the judge to the person to whom the communication is made.

This person being, by the supposition, at a distance from the official place of residence of the judge, now comes the demand for diversification and corresponding complication.

In a country in any tolerable degree civilized, there will be two modes of communication between persons at a distance: the one, which may be styled generally ordinary, to wit, the letter-post, or other public and universally employable receptacle, employed as an instrument of conveyance; the other special, or say particular, to wit, some messenger specially employed for the purpose, making or not making use of some real instrument or instruments of conveyance.

This distinction, though in itself purely theoretical, is pregnant with practical applications, not less obvious than important. Expensive to a degree more or less known by everybody, is even the least expensive submode of the special mode of communication: comparatively unexpensive and economical is the general, or say ordinary modes of conveyance, especially as applied to instruments of communication in the epistolary form.

By appropriate arrangements, the general mode of conveyance, but more particularly the letter-post, might be made to perform (and with not less certainty, and with superior dispatch,) the service by which, in present practice, some special mode of conveyance is commonly, if not universally employed. — But these details belong to a more particular head.

Communication, as we have seen, may be from person to person, or to things, or to persons and things, at the same time.

When it is from person to person, and back again from the second to the first, the two persons may be styled intercommunicants.

§ 3. *Means of communication.*

The first point to be determined is at what place the thing in question shall be done: whether in the judicatory, or elsewhere; and in particular at the abode of the addressee, whether party-litigant or extraneous *evidence holder*. In general, these two cases constitute the only alternative. The reason is, that in general, upon the circumstances it will depend, whether the communication shall

be *oral* or epistolary: oral, if in the justice-chamber; epistolary, if at the abode, permanent or temporary, of the addressee.

But in a particular case, on a particular occasion, need may be, that though made in the presence of the judge, the response will not be to be made in the justice-chamber.

The first source of division is the consideration of the *place* at which the operation is required to be performed: the next is the *purpose* for which in that same place it is to be performed.

In the third case, an extraordinary place concurs with an extraordinary purpose: place, not the justice-chamber, but some other, in which, for the special purpose of that individual suit, and the individual operation, it requires to be performed.

The material circumstance is the *species* of the instrument of discourse,—whether oral, or otherwise evanescent — or scriptitive, or in any other shape *permanent:* this not by reason of the permanence of the instrument — for, for giving expression to the discourse, an instrument of the same degree of permanence might be employed in the judicatory — but by reason of the distance: hence it is by distance, and nothing else, that the necessity of giving employment to this instrument of discourse, to the exclusion of the other, is created.

On the part of a justiciable, whether party pursuer, party defendant, or evidence-holder, in answer to the mandate issued by the judge, the mode of compliance would be either by attendance or responsion: if by attendance, either at the in-door fixed judicatory, or at the out-door occasional and migratory judicatory.

As to the character, or say capacity, in which the modes of compliance are thus exemplified, it might be either that of party pursuer, party defendant, or evidence-holder, or some individual at large, incidentally and casually addressed, for the purpose of contributing, by means of some incidental services which it fell in his way to be able to render, to the giving execution and effect to the law on which the suit was grounded.

Here, then, comes the need for so many corresponding mandates:—

1. Accersitive, or say hither-calling mandate. This when the place at which the service is performed is the judicatory: the service itself is the ordinary in-door service.

2. Missive, or say thither-sending mandate. This when the place at which the service is performed is an incidental and migratory judicatory: the service itself is out-door service.

Only by personal attendance at or in the judicatory, can commencement as above be given to a suit: in which case, the need of missive mandate, on the part of the judge, may be apt to appear superseded. But the individual who, at the first application, is constituted a pursuer, might be either the applicant himself, or any one of two other descriptions of persons: to wit, where the applicant is an assistant, professional or gratuitous, such proxy, or say deputy, being for one or other of the best of reasons admitted instead of the principal; or a ward-constituted pursuer, in consequence of the application made by his guardian; or in a word, who is himself a pursuer, so it be at any period of the suit, after the first; the ward being constituted pursuer in his own right, and for his own benefit — the guardian in the right and for the benefit of the ward, or other trust.

On the part of the addressee, in whatever capacity addressed, — party pursuer, party defendant, or supposed evidence holder, or individual at large, — rendering response in some shape, will be an operation indispensable in every case. By the response, if pertinent to the matter in hand, either compliance with the obligation imposed by the mandate will be completely manifested, or (though for some reason assigned, not at the time performed) promised for some other time, or declaredly declined; if declined, then the object of the response will be, to exonerate the individual from the burthen of eventual suffering, either by satisfaction afforded, or by punishment suffered, or both.

§ 4. *Accessibility-securing.*

With regard to the means of intercourse, thus much is good and true in general,—that on each individual occasion they must be settled with, and adjusted to, the circumstances of the individual with whom the intercourse is to be secured.

As to those individual means, the general nature and character of them will be liable to vary according to the condition in respect of civilization of the country in question: they will depend partly upon the situation of the individuals to be communicated with, partly upon the nature of the means of communication which the state of the country affords.

As to the condition of the individual, in proportion as opulence is abundant, the means of communication are at once capable of being rendered more prompt and more secure: the greater the number of inmates in a house, and the more constant the habit of residence on the part of each, the greater the certainty of conveying to the knowledge of the head, or any other member of the family, the information requisite. In a certain state of society—that, for instance, which to so large an extent has place in America—many are they who have no fixed place of habitation; many again, they who, having each a fixed habitation, leave it habitually unoccupied for any length of time: even in Switzerland, this

latter case is to no inconsiderable extent exemplified.

As to the British Isles, in no part of them is this case exemplified to any considerable extent. Under the name of *vagrancy*, voluntary or involuntary, such is the benevolence and wisdom of English parliaments, it is ever punished as a crime.

In Ireland, the meanest hovel — and such hovels are but too numerous — is either entirely open, or has a door to it: in the general state of things, a door has place; but this being by appropriate force moveable, and as such distrainable, and being, in but too many instances the only thing worth distraining, is sometimes, say all the accounts, distrained for rent. Where the door does not exist, any missive sent by authority may find its way in: with so much the less difficulty where there is a door, the having in it a slit adequate to the purpose of epistolary communication might, without sensible hardship, be rendered a condition indispensable to the use of this instrument of security.

Antecedently to the letter-post, scarcely by the most opulent condition in life, could any absolutely secure means of epistolary intercourse be established. By letter-post, no condition in life so abject, but that, for any purpose such as that in question, it might, in the case of every individual, be established in every instance.

In every the smallest division of territory, the existence of a local headman being supposed, here would be a spot by repairing to which, an individual who had no settled habitation might be sure at any time of finding anything sent thither to his address. For nowhere in the territory of a state could an individual find himself, without finding himself in the territory of a local headman. In the official residence of this functionary, the individual who had no fixed habitation might at all times be sure of finding whatever it had been made his duty to see: and if unable himself to read, there he would moreover be sure of finding those, in whose instance no such inability could have place.

For him who had no fixed habitation of his own, judicial missives — he being prepared and pre-engaged to receive them — might be addressed to him at the local headman's office: and for diminution of vexation to him who has a fixed habitation, another exemplar might be delivered at that same habitation; and so in the case of his having habitations more than one: and in this way may the most convenient provision be made for every occupation and situation in life.

Remains for consideration, the system of intercourse which the country affords: the territory of the state in general, and that portion of it in particular, from, to, and through which, on the individual occasion in question, the communication requires to be made.

In England, compared with all other countries on the globe, for this purpose as for every other, the adequacy of the means of communication is at its maximum, and by the spread of railroads, with self-moving receptacles moving on them, the maximum is in the act of undergoing prodigious increase.

For general purposes at large, and for commercial purposes in particular, in a country in which the population is at such a degree of density, the government post-office performs this function in a manner, the advantages of which are so strongly and universally felt. Justice, alas! presents a very different state of things. On this occasion comes the observation, that, unfortunately for England, the purposes of justice have never been the purposes of judicature, or the purposes of government: had they been, long ago the missionaries of the post-office would have been the missionaries of judicature; modes of delivery and receipt, together with appropriate documentary evidence of the facts, having for this purpose been established. But by the hierarchy of the post-office, probably by the hierarchy of the judicial establishment, obstacles, and those as insuperable as they could contrive to render them, would of course be opposed: to the most effectual and least vexatious arrangement that for this purpose could be proposed, the answer would of course be attached, — useless, mischievous, and impracticable: an official answer rendered familiar to him who writes this, by the habit of seeing it returned to proposed arrangements, which afterwards, when carried into effect, were found beneficial and unexceptionable.

§ 5. *Difficulties obviated.*

For what purpose soever, and in what character soever, on the occasion of a suit or other application, an individual makes his appearance for the first time, the judge will not suffer him to depart, unless he has given indication of some habitation or habitations, at which, during the continuance of the suit, any mandate issuing from or sanctioned by the judge (whether of that territory or any other) will be sure to reach him, if transmitted by the letter-post, or any special messenger.

Of two habitations, indication may be given in the first instance: as thus, till July the first inclusive, a mandate will reach me, parish A of this territory, habitation No. 223; from July the 1st to July 7th, in territory (naming it,) parish C, habitation 67.

Of places of habitation, one after another indication may thus be afforded.

At any time, and so *toties quoties*, the indication given of the intended place of habitation may be changed.

Of every such indication so given, it will be presumed, that down to the last day in each instance any missive delivered at the habitation so indicated has been received by the individual in question, with a view to the purpose for which it was sent, that is to say, in the case of a judicial mandate, with a view to compliance therewith, in such sort that for non-compliance, prehension of the body may be effected.

By any one, in the list of appropriate excuses, the individual non-complying may be originally exempted; or, as the case may be, subsequently liberated from the necessary afflictive consequences.

Such excuse may be either ordinarily emanating, or vicarious: ordinarily emanating, when from the individual himself; vicarious, when from any other person.

Of these there are three lists: —

List 1. Containing those excuses which, in the nature of the case, cannot or are not allowed to emanate from any individual other than him to whom the missive is addressed.

List 2. Containing those which cannot, in the nature of the case, or are not allowed to emanate from the individual himself, and if delivered, must have been delivered by or on behalf of some other person.

List 3. Containing those which may indifferently have emanated either from the individual himself, or from some other person.

This business of securing judicial intercourse cannot but be attended with much diversification, and considerable difficulties: which difficulties are in considerable proportion the result of the natural, as contrasted with the technical system of procedure. Under the technical system of procedure, they have no place. Why? Because, under the techical system of procedure, no suit ever finds its way into the judicatory, but through the medium of a technical assistant.

1. Difficulty the first. The individual an individual by whom an offence in some shape or other has been committed, and who, in the event of his attendance in the judicatory, would expose himself to prehension on the ground of this offence.

Resource, or say arrangement for removal of the difficulty. If the punishment, or other burthen attached to his offence, is more afflictive than privation of the benefit sought for by his attendance, he will abstain from such attendance, and the burthen resulting from non-attendance will be a part, though by supposition no more than a part, of the suffering which is his due; in the other case he will attend. The suffering in question he will undergo; but he will receive a benefit, amounting to the difference between that suffering, and the suffering to which he would be subjected by non-attendance.

In the case of him by whom a professional assistant is employed, all difficulties may be made to disappear by his consent that every missive addressed to him at the habitation of such his assistant, shall be presumed to have been received by him within the appropriate time.

The case in this respect is very different according as it is in the character of proposed pursuer that the individual attends, or in any other character. If in the character of a proposed pursuer, the benefit expected by him to be gained by the suit is a benefit which, by any want of adequacy on the part of the indication afforded, he will be liable to forfeit, and which will accordingly operate as a security for such adequateness.

So, if it is in the character of a trustee regularly constituted, or self-constituted, that he attends. In this case, likewise, the correspondent security will have place, and by the amount of the benefit sought, will supersede the demand for an inducement of the coercive kind in any other shape.

But in every other case than this, such coercive inducement will manifestly be necessary; in particular, if the individual in attendance be a defendant, or an extraneous witness.

2. Difficulty the second. The individual in attendance, say an applicant, a person whose character is without reproach, but who, in respect of his means of livelihood, is in a state of uncertainty each day at what habitation his occupation may require him to be on the next.

In this case, he being by the supposition an applicant, he may be depended upon for doing whatsoever is in his power to save himself from being debarred from the benefit he seeks: as, for instance, giving indication of the employer or employers' habitation for whom he expects to be occupied. If his situation is so unfixed as to deprive him of this resource, the case is of the number of those unfortunate ones, for which the nature of things allows not any remedy. At any rate, this inconvenience cannot be chargeable on the natural system; for under the technical system, an individual so circumstanced would not be able to obtain any such assistance.

3. Difficulty the third. The individual in attendance is one whose attendance is the result of compulsion; he being either a defendant, or an unwilling extraneous witness.

In this case, the judge will have to choose between the evils, and act accordingly —

1. The depriving the party who is in the right, of the benefit of the attendance in question.

2. The subjecting the individual, so in attendance, to confinement, so long as is deemed necessary to the purposes of the suit.

4. Difficulty the fourth. Neither the indi-

vidual in question, nor any person in the habitation occupied by him, able to read.

Expedient for removal, — recourse to some constituted authority, resident in the parish in which the habitation, actual or expected, of the individual in question, is situated.

§ 6. *Future-communication-securing memento.*

The person to whom this memento, signed by the judge, or, under his general direction, by the registrar, is to be delivered, is every person upon his first appearance in the justice-chamber before the judge.

The object, purpose, and use of this instrument, is the securing to the judge the means of communicating with the proposed communicant for the purpose of the suit, until the termination thereof, or until the end of the time during which it may happen to the judge to have need of such communication for the purposes of the suit. As soon as the need of communication with the intended communicant has ceased, information thereof will be afforded him by the registrar. Denomination of the instrument employed for this purpose, — *an ulterior-communication release.*

The following should be the form of the future-communication-securing memento: —

1. Mention the individual's name and description at length, to wit, surname, christian name or names, or the equivalent. Office, if a functionary; other occupation, if a non-functionary; and abode or abodes permanent, if any. Such is the description you have just given of yourself.

2. Take notice, you have declared that until, by an ulterior-communication-release, delivered as above, you have been released from the obligation of communicating with this judicatory, for the purpose of this suit (or application,) every judicial paper, if delivered at that house, will be received by you, or by some agent of yours, authorized on your behalf.

3. In consequence, except in case of legitimate excuse (of the number of those to which the serving in that character has been given by law,) you will, in the event of non-compliance with any judicial mandate, delivered or left at such your chosen place of communication, be punishable, or otherwise dealt with, as for contumacious non-compliance.

At the first bilateral attendance, it belongs to the judge to collect and complete, at the hands of the defendant, information correspondent to that which, on the occasion of the first unilateral attendance, was required to be furnished to the judicatory, and entered upon the register.

CHAPTER XI.

EVIDENCE.

§ 1. *Indicative and appropriate.*

By appropriate evidence, or ultimately employable, understand all such evidence as is fit to enter into the composition of the grounds of the judge's opinative decree, so far as depends upon the question of fact.

By simply indicative evidence, understand such as is not of itself fit to enter into the composition of those same grounds, but affords an indication of some source from whence, supposing the matter issuing from it true, evidence which is appropriate may probably be collected: — as where a person, who was not present at the place and time at which the fact in question took place, states himself as having heard of some other person as having been so present.

Widely different in investigational procedure, is the character of Roman-bred, and English-bred procedure: teeming with imperfections both of them.

As to Roman-bred procedure: throughout the penal branch of the field of law, solicitous and extensive has been the application given to such provision as it has made; in the non-penal branch, on the other hand, the provision has been comparatively scanty, the solicitude remiss.

At the same time, for want of a clear and correct conception of the difference between appropriate and simply-indicative evidence, it has given to evidence, which has been simply indicative, the effect of appropriate evidence. In the affair of Oates, for example, to such a length did this confusion proceed, that between simple indicative evidence presented to the judge, and the appropriate evidence, supposing any to exist, there were four or five portions of simply indicative evidence interposed. It has notwithstanding been received, and made to operate, as if it had been appropriate evidence. Standing before the judge, I, said A, heard from B, that he had heard from C, that C had heard from D, that he had heard from E, that E saw done, by the accused, the deed with which the accused is charged.

English-bred procedure, on the other hand, limits to the penal branch of procedure — and of that branch to no more than a part — the application of the investigational process: to the non-penal branch, it has made no application of it, how great soever may be the importance of the matter in dispute.

On the other hand, in the cases in which it employs the process, it keeps clear of the mischievous absurdity with which, as above, Roman-bred procedure has distinguished itself.

Meantime, nothing can be more manifest than that, if necessary to the discovery of truth in the case of any one species of suit, it cannot be less so in any other.

Of the whole list of vulgar errors, few indeed are so mischievous, few so gross, as that which supposes that, in the minds of that class of men who are styled ministers of justice, minimization of injustice has been the end to which their labours have been directed: to minimization substitute maximization, you will be near the truth.

That injustice might be maximized, it has been their interest, that of the use of falsity (the general instrument of injustice) the frequency should be maximized — the falsity itself maximized — and, moreover, so also the credence given to it.

To this end it is, that to so many various descriptions of persons, on this special occasion, for this special purpose, the licence to commit judicial falsehood with impunity — in one word, the mendacity-licence — has been granted, to an extent so all-comprehensive: and to this licence, in place of punishment, reward upon the most all-comprehensive scale has been awarded.

Descriptions of persons to whom the mendacity-licence has thus been granted, are these —

1. Parties on the pursuer's side.
2. Parties on the defendant's side.
3. Professional assistants, of the order of attorneys.
4. Professional assistants, of the order of advocates.
5. The judges themselves.

Of the error just mentioned, the mischievousness consists in the support given to a system thus deleterious, by the respect with which the authors and supporters of it have down to this time been, and are at this time now regarded.

Correspondent to the mischievousness of this error is its grossness. The mischievousness of the system, so manifest to the eyes of all, so severely felt by all, yet still, in the teeth of universal experience, with very small abatement, the error continues.

More than ten years* have elapsed since, by the hand by which these lines are penning, the opposite truth has been announced in print, and not only announced, but by the most abundant, and particular, and irrefragable proofs, demonstrated.

Imputations more reproachful can scarcely be cast by man on man, than in that work† have been cast upon all implicated; yet still all is silence: and if in any case silence under accusation were confession of guilt, surely so has it been, and so continues it to be in this.

A more flagitious act of calumny could not have been committed, than would by this account have been committed, had the matter of it been other than true.

In no part of the civilized world are the name or the works of the author unknown: on no author that ever applied his labour to this field, have any such marks of approbation and applause been ever bestowed as on him. Ignorance, therefore, of the fact of the accusation, or of the prosecuting of the accusation, cannot, with any shadow of truth, be pleaded; yet still from all these quarters reigns the most imperturbable silence.

In the eyes of the people at large has this demonstration of all this guilt — this confession of guilt — been all this while manifest: the approbation and applause thus bestowed upon the author is such as to him would be sufficient reward, had he but the satisfaction of observing that the people for whom all this labour has been bestowed, and such a load of odium from the highest quarters voluntarily taken upon him, would but derive their profit from what has thus been done for them. But no such reward or satisfaction, so long as he lives, does he seem destined to receive. He pipes, but they do not dance — he makes the advances, but they do not follow. Through the paths it has been his endeavour to lead them, none are at once willing and able to follow.

§ 2. *Exclusion of party's testimony, its ill effects.*

Fertile source of injustice and oppression, the exclusionary rule which shuts the door against the testimony of the party.

Observe the consequences of the rule on the occasion of those dealings which have place, where the party on the one side is in a state of opulence, the other in a state of comparative indigence — say landlord and tenant — opulent customer and dealer — borrower and lender. The comparatively opulent man never acts, or treats of himself: everything he does is by the hand, or the help of an agent — in a word, an attorney. The comparatively indigent man, not being able conveniently to afford the purchase of any such expensive assistance, does everything by himself, and without the assistance of an attorney, deals with the attorney on the other side. Now observe the consequence: to the patrician's attorney the law secures a complete mendacity-licence; everything that he says on behalf of his noble client is evidence — good evidence. How stands it with the plebeian? Nothing that he can say on his own behalf will be so much as heard. On the part of the attorney, suppose the most palpable, the most flagrant perjury: What has he to fear for? Absolutely nothing. By no indictment for perjury, can the man who is injured

* Written in 1823. † Scotch reform.

by the perjury have any the smallest chance for satisfaction in any shape. In the wretched shape of vengeance? Not he indeed: give his testimony he may, but no effect can it ever have. Here is oath against oath: on no such evidence will conviction be ever suffered to have place.

What is observable is, that in this source of injustice and oppression, the aristocracy as such have an obviously strong and sinister interest: whether it be in the nature of the case that they should fail of being fully sensible to the value of this sinister interest, let every one judge.

§ 3. *Evidence receivable.*

Received in every case from the applicant may be as well simply-indicative as appropriate, or say ultimately-employable evidence.

Rationale. — Reasons for the admission: —

1. The individual whose interest the evidence serves or stands to serve, may be unknown to the informant.

2. To the informant more delay, vexation, and expense, if any, may be produced by intercourse (or perhaps previous fruitless endeavours to obtain intercourse,) with persons interested, than by repairing at once to the judicatory, open as it is to him, and to everybody at all times, and provided with evidence-extractive powers, of which he is destitute.

3. A case that frequently has place is, that by fear of others on whom he is more or less dependent,—hope in like manner from others, or sinister counsel, —a person whose lawful interest would be served by giving the information which is in his power, is prevented from so doing: whereas, if, in consequence of simply-indicative evidence furnished by another person, he had, on receiving an appropriate mandate from a judge, attended and delivered his evidence, being thus seen acting under a manifest legal necessity, no such displeasure on the part of the apprehended oppressor would probably have been entertained: at any rate, it would have prevented it from producing any such evil effect as that of a denial of justice.

4. It may happen, that though the question of particular interest is between individual and individual, there has been, in the act indicated, a degree of turpitude, such, that on the account of the public it would be of use that the evil disposition of the agent should become generally known.

Particularly important is the need of simply-indicative evidence, in the case where, by the regulation for the extraction of *self-notificative* evidence, a person of bad repute would as such be naturally disinclined to pay spontaneous attendance: on the ground of the simply-indicative evidence, any such person might nevertheless be made compellable.

Simply-indicative evidence, however, although, with reference to the particular fact in question, unappropriate, will not however be to be omitted out of the record.

Rationale. — 1. It may serve either to impugn or to confirm the trustworthiness of the person from whom, in pursuance of the indication given, appropriate evidence shall have been elicited.

2. In case of criminal or culpable falsehood on the part of an indicative witness, it may be necessary for his conviction of, and punishment for that offence.

Frequently from the same source — for example, from the statement of the same person, evidence of both descriptions will come at the same time: in this case, the distinction will with particular care be to be adverted to, and held up to view by the judge.

§ 4. *Modes of interrogation to be abstained from.*

1. Fact-assuming interrogation. — In this mode, of the fact, the existence or non-existence of which is the subject-matter of inquiry and proof, the existence is assumed and taken for granted.

Example: — "At what distance were you from your friends when you fired at them?" — the subject-matter of pursuit being the alleged offence of firing a gun at those same friends.

For a question of this sort put by a judge, or without reprimand suffered by him to be put, the judge will be reprimanded, and a memorandum of such reprimand entered on the judicial-delinquency register, kept respectively by the appellate judges, and the justice-minister.

For a question so put, for the purpose of entrapping a defendant into a confession, he may be dislocated.

§ 5. *Choice as between species and species of Evidence.*

Avoid, as far as may be, all recourse to character evidence — employ it not, but where the event of the suit depends altogether upon the degree of credit given to the individual witness, to whose character objection is made.

To this purpose, consider, that in English practice the punishment of death has every now and then been inflicted on the ground of no better or other evidence than the testimony of some one individual, to whom as disreputable a character as can be imagined has at the same time been seen to belong: he at the same time being apprized that the preservation of his life depends upon his giving his testimony in a certain direction.

To the judge's notice the observation will not escape, that to the thread of character-evidence, when once begun to be spun, there is no certain termination

Generally speaking, where, as under this code, the power of interrogation is given to every description of person, in whose instance it affords a promise of being of use, and the exercise of it is unfettered by needless and useless rules, few mendacious witnesses will pass undetected, and any additional light that by possibility might be afforded by examination into general reputation, will be of little worth: the mode of communication at all future times with every witness being secured, and the faculty of re-examining at any time during or subsequently to the continuance of the suit in question being reserved. Under English practice, it is to the inaptitude of the whole system that character-evidence and *alibi*-evidence are principally indebted for the importance ascribed to them, and the use made of them.

Alibi evidence. — Against deception, and from evidence of this description, the judge will be in a great degree guarded, by the indispensable arrangement, the communication-securing arrangement: carried into practice, as it will be, in the instance of every individual who makes his appearance before a judge, either in the character of applicant pursuer, defendant, or extraneous witness.

This is of the number of the cases in which an adequate demand for character-evidence is most apt and likely to have place.

§ 6. *Causes of mendacity — Practice of English judges.*

Of Hudibras it is recorded thus: —

> . . . . . he scarce could ope
> His mouth, but out there flew a trope.

Of an English lawyer, and more especially of an English judge, the same thing may be recorded with much more truth and reason, though without rhyme, if for the word trope, the word lie be substituted.

The judges more especially, as being the causes that lies are in other men, may be termed with distinction, κατ' ἐξοχην, *the fathers of lies:* for it is by them, that from first to last, lies have not only been tolerated and uttered, but actually compelled — compelled on pain of outlawry.

If veracity be part of morality, if in mendacity there be criminality, — one of two things, to any one, be he who he may, is inevitable: — either morality itself must be an object of his contempt, or the whole tribe of English judges: they by whom, if at their instigation a man refused to defile himself by a lie, he would be punished by them as for *a contempt* — (for that is the appropriate phrase) — for contempt manifested to their authority.

Evidence immediate and intermediate, or say interventional. By *immediate*, understand a statement made by a self-alleged percipient witness, in relation to the matter of fact reported by him.

By *intermediate*, or say interventional evidence, understand a statement made by a person who is not, with relation to the matter of fact, a self-alleged percipient witness, but in relation to the matter in question has received his conception from some person, represented to him in the character of a percipient witness; to wit, either immediately, or through the medium of any number of intermediate witnesses, making a statement to the same effect the one to the other, in a chain of any length.

Uses of intermediate evidence: — 1. Serving for the procurement of immediate evidence; 2. Eventually serving in lieu of, or in addition to, immediate evidence.

Exceptions excepted, intermediate evidence will not be ultimately employable; to wit, in the character of a ground, or constituted part of a ground, for a judicial decree or mandate.

Exception is, where the alleged percipient witness is not examinable, but at the expense of preponderate evil, in the conjunct and aggregate shapes of delay, vexation, and pecuniary expense.

§ 7. *Probation.*

Probation is an operation, which in all cases must be performed on the pursuer's side, and in many instances comes to be performed on the defendant's side.

On the pursuer's side, under this system of procedure (it being the natural one,) a course of probation is complete, or incomplete and partial, as it may happen, being involved in the operation of application by and with which the suit commences.

It includes in it constantly two assertions: the matter of one of them being the matter of law, declaring the existence of a portion of the code, to this or that effect; the other having for its subject-matter fact; to wit, an individual fact, in relation to which an arrangement to the effect stated as above has been made by the portion in question of the text of the law.

Of the application, the substance and effect has been to demand at the hands of the judge a certain judicial service. This service consists in giving, on the occasion in question, execution and effect to a certain portion of the text of the code, viz. the portion just spoken of: and the warrant for the operation which the judge is so called upon to perform, is the existence of the above-mentioned matter of fact, bearing such relation as above mentioned, to the above-mentioned portion of the matter of law.

Example: — Suppose the service demanded, compensation at the charge of a defendant, for a wrong alleged to have been done by him to the pursuer, by a blow given to him on a certain part of the body. By the wrong thus done, an offence, belonging to a certain genus of offences, has been committed — a genus of

which the denomination is, *wrongful corporal vexation*.

In this case, the matter of fact has for its alleged percipient witness the applicant himself, who, if he is to be believed, has been the immediate sufferer by the wrong.

But suppose, according to the case stated by him, the person on whose body the wrong was inflicted — the offence committed — was not the applicant himself, but a child of his, too young to be capable of stating the matter of fact.

In this case we see two distinguishable matters, or alleged matters of fact: —

1. The act by which, if the allegation be true, the blow was given: call this the principal fact.

2. The act performed by the applicant in making the allegation to this effect: call this the evidentiary fact.

By the allegation thus made, the existence of the principal fact has been provisionally, or say eventually proved: if, in the opinion of the judge, the assertion so made is true, insomuch that the principal fact asserted by it to have happened, did really happen at the time and place asserted, *i. e.* supposing him inclined to believe it; — failing proof to the contrary, he will declare accordingly. But it may be (for so the experience of the judge will have demonstrated to him,) that the allegation the applicant has thus been making is, in the whole, or some essential circumstance, untrue: by the applicant or his child, no such blow was received — or if received, received from accident, such as an unintended push by another person, or the fall of some utensil from a shelf, &c.: any of which matters of fact, the defendant might and would with truth assert, if the opportunity were given him of being heard. Relation had to the evidence so delivered as above, such evidence, if delivered by the defendant, would be counter-evidence: it may be delivered either by the defendant himself, who, in virtue of being himself the deliverer of it, would be a party witness, or say a litigant witness; or by a third person, who (not having been placed by the pursuer either on his side, in confirmation of the demand as a co-pursuer, or on the defendant's side, as a co-defendant) may be styled an extraneous witness.

But what may also be is, that all the pursuer has said is exactly true; and yet the fact thus averred, and we will suppose and say proved by him, will not be sufficient to warrant the judge in rendering to him the service so demanded, as above. It may be, that though the defendant gave him the blow, it was not till after he himself had given the defendant a blow, and that a more violent one; and that the blow so given to the pursuer had no other object than to prevent him from giving the defendant other blows, which he saw the pursuer prepared to give. Making an assertion to this effect, he will be delivering another species of counter-evidence, evidence probative of a fact, not consisting of the negative of the fact asserted by the pursuer, but of a totally distinct fact, of the positive kind, the effect of which, in respect of the destroying the ground of the demand, would be the same as that of the just-mentioned negative one.

§ 8. *Evidence as to character.*

By evidence as to character, or say character-evidence, understand evidence having for its subject-matter the aptitude of the individual — aptitude, moral, intellectual, and active, with relation to the part acted or proposed to be acted by him in the suit; whether it be that of — 1. Party-pursuer; 2. Party-defendant; or 3. Extraneous witness.

Case the 1st, that of a party on the pursuer's side.

On the subject of the aptitude of the individual to be received in the character of pursuer, no evidence will be received. Reason: No person should be excluded from the capacity of demanding remedy in every shape, from wrong in any shape.

Case the 2d, that of a party on the defendant's side.

On the subject of the aptitude of an individual to be received in the capacity of defendant, no evidence will be received. Reason: No person should be excluded from the capacity of preserving himself from undue burthen, on the score of remedy for wrong alleged to have been done by him; if he were, he might be wrongfully subjected to whatsoever suffering is ordained by law to be inflicted, whether for the purpose of satisfaction, or the purpose of punishment.

Case the 3d, that of an extraneous witness.

In the first instance, exception excepted, no evidence will be received in relation to the character of an extraneous witness.

Exception is, where the proposed witness has been convicted of judicial falsehood, criminal or culpable, or say with evil consciousness, or through culpable inattention. In such cases, use may be made of the record in which such conviction is recorded; and this without other reference than the inspection of that record on the spot, or the procurement of it through the letter-post.

In the case when, of two witnesses the evidence being irreconcilably contradictory, and the decree as to the question of fact depending on the credence given to the one or the other, — if, in relation to one of the witnesses by a party on either side, declaration is made that he is generally regarded as a person in whom mendacity is habitual, power to the judge to elicit evidence in proof of the untrustworthiness so alleged.

But in the exercise of this power he will be guided by the consideration of the importance of the subject-matter in dispute, compared with the expense, delay, and vexation likely to result from the elicitation of the mass of evidence, the elicitation of which is likely to be on sufficient grounds demanded.

Why, in ordinary cases, put an exclusion upon character evidence?

Answer: For the reason that the effect of any evidence, in affirmance even of habitual mendacity, will not be to produce the exclusion of the individual in the capacity of a witness: sole effect, that of producing an opinion in affirmance of a corresponding degree of comparative untrustworthiness on the part of his personal evidence.

For this opinion, the utmost ground that can be afforded cannot amount to anything more than as a weakly operating article of circumstantial evidence. It follows not, that because a man has uttered wilful falsehood, in cases where in case of mendacity no punishment awaited him, he would, in anything like to an equal degree, be likely so to do in a case in which by such mendacity he exposed himself to the punishment appointed by the law for that crime.

Boundless is the delay, expense, and vexation which it would be in the power of a *mala fide* litigant to necessitate, if an unlimited right of calling in evidence for this purpose were established.

Boundless the number of witnesses whose evidence might be called in, in the first instance; for the need would be variable according to the importance of the matter in dispute, and the difficulty attendant on the question of fact, with or without other circumstances. Incompatible with any well-grounded decision on the question regarding evidence, would be every attempt to fix the allowable number of character-witnesses, by any general rule.

But if, in the first instance, no well-grounded limits could be put to the number of mendacity-imputing witnesses, as above, so neither could there be to the number of mendacity-imputing witnesses, whose evidence was demanded for the purpose of imputing mendacity to any or all of the first set, of mendacity-imputing witnesses. Here, then, might be a second set — thence a third set — and so on; the number increasing in a geometrical ratio.

To an assertion imputing habitual mendacity to a man — to an assertion to this effect, how decidedly soever mendacious, no punishment, as for mendacity, could be attached, unless asseveration of individual acts of mendacity, as having been committed on so many individual occasions, were received. But to give acceptance to such asseverations, would be to include in the bosom of this suit, the procedure in relation to as many distinguishable suits as those acts of mendacity so imputed; for as in other cases, so in this: if criminative or inculpative evidence were received, how, consistently with justice, could excriminative or exculpative evidence be excluded?

By the vexation which, on the part of the witnesses themselves, would be attached on the elicitation of their evidence, a proportionable objection to the elicitation of it would be afforded. As to compensation — out of no other pocket than that of the inviting party could it come; and in this case the benefit of it would be allotted exclusively to the relatively opulent, to the exclusion of the relatively unopulent.

Existing system.—It admits of character-evidence, not only in relation to extraneous witnesses, but in relation to parties defendant; not only of the dyslogistic, including the mendacity-imputing cast, but of the eulogistic cast: and altogether boundless is it, as to number: and without exception as to quality is it, as to the persons whom it renders consultable.

CHAPTER XII.

INITIATORY HEARING.

§ 1. *Commencement of a Suit.*

EVERY suit must have its commencement: in this circumstance all suits agree. But different sorts of suits, or suits of the same sort, may be commenced in any one of a considerable variety of modes.

Under the present proposed code, every suit takes its commencement in the same manner: personal application made by some individual to the judge; for, to the judge, and to him alone, belongs the power to give execution and effect to it. This accordingly may be styled the natural system of procedure.

Sooner or later, at some time or other, an application by somebody to the judge (unless he himself will give commencement to the suit,) cannot but be made. But if made at all, at what other period can it with so much propriety be made — be made with so little danger of substantial injustice, with so little of evil in the shape of expense, vexation, and delay? The expense is minimized; for the sole expense is that of the applicant's time: vexation is minimized, for to no individual is vexation in any other shape produced; and, in the case of that individual, the vexation is more than compensated for, or he would not inflict it on himself: delay is also minimized, or rather at this point it is excluded.

In no other mode can commencement be given to a suit, without a mass of evil in the

united shapes of expense, vexation, and delay, to which there are no bounds.

To commencement in this mode (if this be the mode throughout the territories of the state,) a multitude of judicatories, stationed with reference to facility of approach to applicants, are evidently indispensable. But whatever be their number, it follows not, that in the mode of procedure (military judicature being out of the question,) any the smallest difference should have place.

Under the English judge-made law, not only different sorts of suits, but in different judicatories, suits of the same sorts, take their commencement in a variety of different manners.

In all these judicatories, the mode of commencement agrees however in this; to wit, that the suit does not commence by personal application made by any individual to the judge. Should any such application be made, it would be instantly, and not without indignation, refused — a refusal with indignation, which, were the application made in secret, would beyond dispute be justifiable and indispensable.

Two different modes of commencement are here distinguishable:—1. Non-penal, styled civil; and, 2. Penal. In the civil, moreover, may be distinguished, two sub-modes—the common-law mode, and the equity mode.

The common-law mode is that pursued in the common-law judicatories; to wit, the King's Bench, the Common Pleas, and the common-law side of the Exchequer.

In all cases, the object being to put money into the pockets of the judges, to that object, and that alone, except the like benefit to the other members of the firm of Judge and Co., the mode of procedure is made subservient. In Westminster Hall and its purlieus, Judge and Co. keep open shop. For the profit upon the expense, they sell to every individual that will pay the price of it, the power of imposing expense and vexation to an amount more or less considerable — to any person, and any number of persons, or purchasers, as may choose — at whatever distance it be from the shop, so it is within the limits of the English part of the kingdom. To this shop, the plaintiff who has suffered wrong is forced to make application, and thus add suffering to suffering ere he can begin to take his chance for relief. The plaintiff whose object is to do wrong, employs the hand of the judge as an instrument, and having paid the price of it, is then enabled to commence the career of wrong, heaping suffering upon suffering, until the measure of intended wrong is filled, and the proposed quantity of suffering produced.

At these same shops are sold, in this shape, with the exception of certain privileged classes, the personal liberty of every man, to whoever would pay the price, down to a certain time within the memory of men now living, without other condition than that of paying the price; since that time subject to a condition, which, while it diminishes the evil in extent, gives increase to it in magnitude. The seizure of the person cannot take place without a previous written instrument, consisting of a declaration made by the plaintiff, and sanctioned by an oath, affirming the existence of a pecuniary demand on his part, to a certain amount on the score of debt.

Of the founders and supporters of this system of law, the morality may be seen in the length of time during which this unlimited sale of this unlimited power of oppression continued to be carried on: and also in the inadequacy of the remedy to its professed purpose. Instead of being creditor to his intended victim, the plaintiff may be his debtor to an unlimited amount; and still, without incurring the professedly threatened penalty, he may work the intended wrong. By a word or two, the form of working it with impunity could have been refused to every plaintiff, who could not prove himself creditor upon the balance. To mischief, working by Judge and Co., matters are so ordered, that by no hand can remedy be applied other than that of Judge and Co. It is, accordingly, on every occasion, sure to be as secure and as fertile in ulterior mischief as the craft can make it. In parliament, by no hand but by that of a lawyer, can relief to any oppression, of which law is the instrument, be applied. If no one appears, the bill is of course rejected; scorn and contempt being at the same time the reward of the benevolent hand by which it was presented. I am not prepared, says the chief of the king's long-robed creatures in the House of Lords — I am not prepared; and in this situation the non-preparation has the effect of the king's negative.

§ 2. *Initiatory application, litiscontestational.*

The applicant being established in the character of a litiscontestational applicant, or say pursuer, and a correspondent memorandum entered on the register, the judge will have to consider the next operation, or assemblage of operations, which the nature of the case requires at his hands.

These operations may be either operations affecting persons alone, operations affecting things alone, or operations applying to persons and things.

Exceptions excepted, the next operation will be performed by the issuing of—1. A proposed defendant's attendance-requiring mandate. In case of defendants more than one, an attendance-requiring mandate for each one. 2. A proposed defendant's examination-mandate, or say *examination-paper;* and so where there are proposed defendants more than one, defendants' examination-paper addressed to

each; the proposed defendant being, in this case, the only person addressed in the first place.

Exceptions are, when in consideration of the state of the case, as resulting from the examination of the applicant, as entered in the record it appears to the judge that the purposes of justice are more effectually accomplished by the simultaneous or previous issuing of an attendance-requiring or examination mandate, as the case may appear to require, addressed to a proposed co-pursuer, or to a supposed evidence holder, and proposed furnisher of evidence, personal, real, or written, or of all three sorts, or of any two thereof, as the case may be.

In case of need, in lieu of an attendance-requiring mandate, the judge may, in the case of any one or more of such persons, issue a prehension mandate.

Of the need of a prehension mandate, in lieu of an attendance-requiring mandate, at the charge of the proposed co-pursuer, an example may be found where, in relation to the service required at the hands of the judge, the proposed co-pursuer has an interest conjoint with that of the applicant; but an apprehension exists, lest, through indolence or fear of resentment, at the hands of a proposed defendant, the proposed co-pursuer might be induced rather to give up the pursuit of such his interest, than join in the pursuit of it.

Note, that if the apprehended non-pursuit would have for its cause fear of resentment, as above, it may be for the advantage of the proposed co-pursuer, that his junction with the applicant pursuer should appear to be the result rather of inevitable necessity, than of consent.

Of this need of a course taken for causing the attendance, or even response, on the part of a proposed co-pursuer, antecedently to attendance or response on the part of a proposed defendant, or even to the issuing of a mandate for the procurement thereof respectively, the same example may serve.

Of the need of an attendance-requiring, or a prehension mandate, at the charge of a supposed evidence holder and proposed evidence furnisher, examples are the same as in the case of a proposed co-pursuer; and the reluctance on both accounts will be more apt to have place.

In regard to attendance-requiring or prehension at the charge of a proposed evidence furnisher, the question for the consideration of the judge will be, by which course the greatest detriment would accrue to the interest of both parties and the public; to wit, by the vexation attached to the furnishing of the evidence, or by the danger of a decision adverse to the interest of the applicant-pursuer for want of the evidence so desired.

Of the vexation attached to the furnishing of the desired evidence, the quantum will be considered on each of two suppositions; to wit, absence of compensation, pecuniary or quasi-pecuniary, and receipt of compensation in such quantity and quality as the judge may think reasonable, and the applicant pursuer able and willing to allow.

On the occasion of such allowance, it will also be for consideration what, if any, ground there is for the expectation, that in the event of the pursuer's succeeding in his demand, it will be right (the pecuniary and other circumstances of the proposed defendant considered,) and practicable at the same time, consistent with justice, that the burthen should be transferred from the shoulders of the pursuer to those of the defendant.

To this purpose, a circumstance pre-eminently material will be the importance of the proposed evidence-furnisher's evidence, with relation to the event of the suit. The case in which this importance will be in the highest degree, is that where, for the proof of the supposed fact, the nature of the case does not at the time in question afford any evidence other than his. Next comes that in which, in interest or supposed affection, the supposed evidence holder and proposed evidence furnisher, is apprehended to be adverse to the pursuer's person, or to this his demand.

The greater the number of the persons capable of furnishing the evidence required, and the more material the evidence in the instance of each, the less will be the need for taking the more vexatious course for the procurement of their evidence respectively.

For the more effectual avoidance of needless delay, or vexation and expense, — out of the whole number of supposed evidence holders proposed to him, the judge may take for examination in the first instance any lesser number, reserving to himself the power of doing the like in the case of any additional number; and this not only at a time anterior to that of the defendant's answer, or personal attendance, as the case may be, but even at a time posterior, not only to that of the defendant's response or attendance, but to the time of his having furnished evidence from extraneous and non-litigant witnesses.

§ 3. *Reiteration of suits — none.*

Previously to the giving admittance to the applicant in the character of pursuer, the judge will examine him as to the having made the same demand by application to any other judicatory.

Exceptions excepted, — in respect of no suit which has been terminated, or is pending in any judicatory, shall application be made by any party, on either side, to any other than the appropriate appellate judicatory.

For in this case, such fresh suit would, if

suffered to be entertained, have the effect of an appeal.

Exceptions may be when, after the termination of a suit in an immediate judicatory, whether without appeal or with an appeal, evidence, the existence of which the applicant had no knowledge or suspicion of, has been made known to him: at the same time that for the elicitation of the aggregate mass of appropriate evidence, including that which had been elicited in the course of the former suit, in the judicatory thus applied to in the second instance, the suit may be carried on, and terminated in a manner more conformable to the ends of justice, direct and collateral together, taken in the aggregate, than in the judicatory in which, in and by the first suit, it received its termination.

On an occasion of this sort, by the examination of the applicant, the judge will obtain satisfaction in relation to the facts, from which it will appear, on the side of which judicatory the balance is, in respect of preponderate convenience.

If, of the evidence thus adduced, the effect be that of counter-evidence, in relation to a *principal*, decided upon on the occasion of the former suit, the judge will use his discretion as to the taking for the ground of his decision in addition to the fresh body of evidence, the evidence elicited on the occasion of the former suit, as exhibited in the record, or re-eliciting the evidence elicited on that former occasion; or, after eliciting the fresh evidence, referring the applicant to the judicatory in which the suit received its termination in the former instance.

In case of his determining to employ the evidence elicited in the former suit, an exemplar of it will, of course, unless mislaid or lost, or wilfully destroyed, be already in the possession or power of the applicant.

In contemplation of this contingency, if the stock of such exemplars (eight in number which are as many as are capable of being in equal perfection taken at once) be not exhausted by other more certainly needful demands, there may be a use in furnishing the party or parties on both sides, with additional exemplars respectively.

It may be, that by a party in whose disfavour, (though as far as the mass of evidence actually produced is considered on sufficient grounds) the suit received its termination, expectation of being able at some future time to exhibit a piece of evidence, not at that time in his possession, power, or even knowledge, may be entertained. In this case it will rest with him to request of the judge for this purpose a spare exemplar, and with the judge to grant or refuse it according to circumstances as above.

If the fresh evidence, as announced, do not contain in it any evidence of a nature to operate as counter-evidence in relation to a principal fact *evidenced to*, — a principal fact of the number of those, to the probation of which evidence was employed in the former suit; but only evidence in support of a *counter-fact*, that is to say, a fact constituting, or helping to constitute, a decision opposite to that come to in the former suit; — in such case the judge will not entertain any objection to the decision come to as to the matter of fact in the former case by the other judicatory: but in relation to the evidence adduced as proof of the counter-fact, he will pronounce such opinion as appears to him well grounded, and therefore and thereupon, such imperative decree as the case requires, in affirmance or disaffirmance of the decree pronounced on the occasion of such anterior suit.

On this occasion, as on every other in which a fresh suit is endeavoured to be commenced on the ground of evidence alleged to have been discovered not till after the elicitation of the evidence in the course of the former suit, the judge will with particular attention scrutinize into the truth of the allegation, lest by needless reiteration of suits, danger of misdecision or delay, vexation and expense, should, by evil consciousness, negligence or temerity, be increased.

It may be, that after the decease or incapacitation of him who was pursuer or defendant in the former suit, discovery of fresh material evidence may have been made, or may be alleged to have been made, by the post-obituary, or other representative of the party in that former case. In this case it may naturally happen, that the knowledge of what passed on the occasion of the former suit is not so perfect and adequate on the part of the representative, as it would have been on the part of the principal: and in particular what may happen is, that though the spare exemplar had been obtained by the principal, neither of the one nor of the other is the existence known to the representative.

For the ascertaining the fact of the existence of such anterior suit, the judge will, in case of doubt, address himself by an appropriate instrument — an *information-requesting address*, to any such judicatory or judicatories as the occasion shall have suggested to him as likely to possess the information needed.

§ 4. *Demand-Paper.*

In the demand paper will be inserted the denomination of the offence, to which it appears that the act is referable.

As in numerous instances the offences run into one another in such sort, that the same individual act may without impropriety, be susceptible of several denominations, — or it may as yet be matter of uncertainty to which of several the evidence may, on judicial ex-

amination be found to apply— divers offences may to this purpose be named in the disjunctive.

When the demand paper is brought ready filled up under the proper heads, time will so far be saved, and trouble saved to the judge: it will in this case have been the work of the pursuer, or his legal advisers.

In the case where an uninformed and unassisted individual comes to tell his story to the judge, it will belong to the judge, upon taking his examination, to fill up the demand-paper.

As the supposed facts come out in the course of the examination, the denomination of the offence may from time to time be amended *toties quoties*: offence or offences struck out — offence or offences added.

By the same person, to the same person, wrong in an indefinitely numerous variety of shapes, each of them characterized by the denomination of an offence, may have happened to have been committed. By one and the same lot or mass of evidence, it may happen to it to have been substantiated; by decision pronounced on all the demands at the same time, delay, vexation, and expense will be minimized.

Thus, by the multitude of the instances of wrong, no room is afforded for the giving impunity in any of them.

In this case, whatsoever has been the number of the wrongs committed, each productive of its separate mischief, so many separate demand papers may there be.

It may be, that in regard to several wrongs committed on the same day, by the wronger on the wronged, in the instance of one or more of them, the wronger has had one or more accomplices; in another, others; in another, none. Out of this circumstance arises a farther demand for separate demand papers.

Demand-Paper A.

Demand and suit simply requisitive — not inculpative.

Heads, under which the matter of a pursuer's demand is to be stated for the purpose of the judge's determination, whether to call upon any person, in the character of a proposed defendant, to comply with the demand, or contest it: —

I. Pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex.

2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married.

3. Age. Time of birth, if not exactly known, according to conjecture; if exactly known, year, month, and day of the month.

4. Birth-place; whether within or without the territory of the state: if within, mentioning the district, subdistrict, and bis-subdistrict.

5. Occupation — or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

1. Habitation, to which a mandate or other message from the judicatory may be directed with assurance of its being received, — the habitation being identified, as per Election Code. On every change, the information under this head will have to receive a corresponding change.

III. Effective service demanded.

This is that which is performed by concurrence in the division of the subject-matter, of one inchoate and ineffective, into a number of consummate and effective rights; to wit, by the correspondent judicial service.

N. B. The right to an as yet unliquidated portion of an aggregate mass of property, is an inchoate and ineffective right as to every part of it: the right to any such part, when, by an act of the judge, separated from the rest and conferred on a demandant, to be by him possessed in severalty, is a consummate and effective right; the exercise of it not requiring any ulterior act on the part of the judge.

For the list of the cases in which, to render it as above effective, a right requires a corresponding act or set of acts on the part of the judge, see — the *Right-conferring Code*, or say, the *Non-penal Code*.

IV. Collative portion of law relied on.

Under this head, mention will be made of the code, chapter, section, and article, in which inchoate rights of the sort in question are mentioned, with the cases and modes in which they may be rendered consummate.

V. Collative fact alleged.

This will be an individual event, or state of things, of the number of those which, in virtue of the correspondent collative portion of law, have the effect of giving to the person in whose favour they have place, the right to demand the effective service of the sort in No. III. mentioned. Example: —

P. E. being possessed of a portion of land called Springfield, situated in the bis-sub-district called Highbury, having four children, of whom the pursuer D. E. is one, died, to wit, on or about the 1st of January 18 ; whereby, under the law, as per No IV. the pursuer is entitled to demand at the hands of the judge, one equal fourth part of the said portion of land, and at the hands of the other three, their concurrence in the division so to be made.

VI. Co-demandant or demandants, — none. Proposed defendants—A. E., B. E., and C. E., co-interessees with D. E. as above.

VII. Evidence looked to in proof of the collative fact alleged, as per No. V. personal: the declarations expected from the mouths of C. G., E. H., and M. R., who were present at the death.

VIII. Ablative fact, none. Example:

1. To no person had the deceased transferred the said land, or any part of it.

2. No statement had he made, ordering any other disposition to be made of it.

IX. Counter-evidence,—none—no person either entitled or disposed, by oral judicial statement, or otherwise, to deliver evidence, in contradiction to the legitimacy of the pursuer, or the death of the person hereby alleged to be dead.

X. Counter-demand, —none. No person has, or conceives he has, any demand upon the pursuer, of such sort as to disqualify him from making this demand.

XI. Judicial service demanded. This service consists in the issuing and giving execution and effect to such judicial mandates as shall be requisite and sufficient to put the pursuer in possession of his said equal fourth part of the said land.

This case is the one first brought to view, as being, in appearance at least, the simplest. But it is one by which but a small part of the field of law, substantive and adjective together, is covered. It is, however, the sort of case by which the greatest variety of complication is exhibited; and in which the mass of unavoidable delay, vexation, and expense is apt to be maximized.

DEMAND-PAPER B.

The demand inculpative, but not criminative.

Heads under which the matter of the pursuer's demand is to be stated for the purpose of the judge's determination, whether to call upon any person, in the character of a proposed defendant, to comply with the demand, or to contest it: —

I. Pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex. — 2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married. — 3. Age. Time of birth, if not exactly known, according to conjecture: if exactly known, year, month, and day of the month. — 4. Birthplace, whether within or without the territory of the state; if within, mentioning the district, subdistrict, and bis-subdistrict. — 5. Occupation or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

1. Habitation, to which a mandate, or other message from the judicatory, may be directed, with assurance of its being received, the habitation being identified, as per Election Code.

On every change, the information under this head will have to receive a corresponding change.

III. Effective service demanded; to wit —

Appropriate satisfaction for some wrong alleged to have been done to the pursuer by the proposed defendant; that is to say, for some individual act, productive of damage in some shape to the pursuer, and as such at least culpable; belonging to some one of the sorts of offences mentioned under the head of private offences, or offences against individuals, in the wrong-restraining, or say, the Penal Code; mentioning the name of the sort of wrong, with the chapter or chapters, section or sections, and article or articles, in which the description of it is given, together with that of the sort of satisfaction provided in respect of it.

IV. Collative portion of law relied on by the pursuers.

This will consist of the article or articles referred to, in the manner in No. III. particularized. It is called collative, in respect of its conferring on the pursuer the right to the effective service demanded, as per No. III. Collative with relation to the pursuer's title to the service, as above, demanded by him, — it will, with relation to the burthen imposed on the defendant, by the obligation of rendering that same service, be *onerative*.

V. Collative fact alleged.

This will be the committal of an individual act, of the sort of some one of those mentioned in No. III.

VI. Co-demandant or co-demandants, if any, and proposed defendant or defendants.

Those persons, to wit, who, by the pursuer are looked to in those several capacities; with their several descriptions, as per No. I.: also the means of intercourse with them respectively, as far as known or believed, as per No. II.

VII. Sources of the evidence looked to in proof of the collative fact alleged, as per No. V.; to wit,

Such persons, together with such writings, and such other things, if any, as the pursuer looks to, in that character, for support to his demand. The evidence itself will remain to be elicited at the hearing, from those its several sources.

VIII. Ablative facts negatived.

Of any adequate ablative fact, the effect will be, in every case, to take away any right conferred by a collative fact. The affirmance of the non-existence of all such ablative facts must therefore be exacted, as well as the affirmance of the existence of a collative fact, as per No. V., and thence of a right to the effective service demanded, as per No. III.

Ablative with relation to the pursuer's title to the service demanded by him, — with relation to the burthen imposed on the defendant by the obligation of rendering that same service, it will be *exonerative*.

IX. Counter-evidence, if any, from what sources expected. Counter-evidence, or evidence either in disproof of a fact which, with reference to the pursuer's demand, is a

collative fact, as per No. V., or in proof of a fact which, with reference to it, is an ablative fact, as per No. VIII.

X. Counter-demand, whether any, and if any, what, according to the knowledge or belief of the pursuer, declared: counter-demand, to wit, a demand on the part of the proposed defendant, at the charge of the now pursuer. Any such counter-demand, if just, will, according to the value of it, compared with that of the corresponding effective service, as per No. III., take away the pursuer's right to it.

But it will not afford, as an ablative fact would, a ground for the dismissal of the demand: only for doing away, or lessening the amount of, any preliminary security which might be needful for securing execution to the collative law, as per No. IV., and thence to the pursuer the benefit of the effective service.

XI. Judicial service demanded.

This will consist in the performance of all such judicial acts as will be necessary to the effective service, as per No. III., to be rendered.

DEMAND-PAPER C.

Demand criminative, — Offence, case and suit, penal, and publico-private.

I. Pursuer, with description and means of intercourse, as before.

II. Effective service demanded: —

I. By the individual wronged, — satisfaction, to wit — 1. The restitution of an article of property, furtively taken; 2. Money, in compensation for the loss, and vexation and expense occasioned by this pursuit.

II. By the government advocate, — the service that will be rendered to the public, by the defendant's being made to suffer the appropriate punishment; to wit, by the tendency of such punishment to restrain others from the commission of the like offences.

III. Collative law invoked, — the law by which, for theft, a man is rendered as above, satisfactionally, and moreover punitionally responsible.

IV. Collative fact alleged, — the act of theft, whereby the article was stolen by the proposed defendant.

V. Defendant, — A. L, inmate of the habitation No. 4, in Cross Street, in the town of Woolton, in this subdistrict, labourer.

VI. Evidence, — personal. The statement ready to be declared by me the pursuer, who saw the act of theft committed by proposed defendant, and who, having prehended him, have brought him hither.

VII. Counter-evidence, — none. Neither the proposed defendant nor any other person can, to my knowledge or belief, allege with truth, anything in contradiction to No. IV.

VIII. Ablative facts, none. No fact whatever, can in the character of an ablative fact, apply to this case, unless where (with reference to punishment,) evidence of one co-delinquent may have been offered, with or without reward, for the discovery of another or others.

IX. Counter-demand. None applies to this case.

X. Judicial service. This will have two branches, correspondent to those of the demand: —

1. Service to the individual wronged, by causing the stolen goods to be restored to him by the thief, together with money obtained by the loan or sale of any such property, immoveable or moveable, as he may happen to have, in compensation for the private wrong, as above; to wit, by the several appropriate judicial mandates.

2. Service rendered to the public, by the issuing of any such incarceration or other punitional mandate, by the execution of which the imprisonment or other punishment may be inflicted.

Of the case where the demand is in its nature invariable, examples are as follows: —

1. Subject-matter of the demand, — the entire property of this or that individual thing moveable — as a beast, or article of furniture, &c.

2. Or of a thing immoveable — as a house with the appurtenances, a piece of land, &c.

Of the case where the subject-matter of demand is in its nature variable, examples are — all cases in which money is demanded in compensation for wrong sustained.

DEMAND-PAPER D.

The demand either criminative or inculpative. Offence, suit and case, penal and purely public.

Heads under which the matter of a pursuer's demand is to be stated, for the purpose of the judge's determination whether to call upon any person, in the character of a proposed defendant, to comply with the demand or to contest it: —

I. Effective service demanded. This is the service which, in the event of his being proved guilty, will be rendered to the public, by the defendant's being subjected to the punishment incurred by the collative fact No. III. in virtue of the collative law No. II.

II. Collative portion of law relied on. This will be the portion by which the character of an offence is given to a sort of act, in which the individual act charged upon the proposed defendant, as constituting the correspondent collative fact, is comprehended. It is termed collative, in respect of its being regarded as conferring on the pursuer, in behalf of the public, the right to the effective service demanded, as per No. I.

III. Collative fact alleged.

This will be an individual act, charged upon the proposed defendant, as compre-

hended in one of the sorts of acts to which the character of offences is given by the collative law, No II.

Collative with relation to the pursuer's title to demand the effective service as above demanded by him, — it will, with relation to the burthen imposed upon the defendant by the obligation of rendering that same service, be onerative.

IV. Proposed defendant or defendants, with their several descriptions, as far as known or believed, together with the means of intercourse with them respectively, for the purpose of the suit, under their several and respective heads.

V. Sources of the evidence looked to, for the proof of the collative fact alleged as per No. III.; to wit, such persons, together with such writings, and such other things, if any, as the pursuer looks to in that character for support to his demand. The evidence itself will remain to be elicited at the hearing from those its several sources.

VI. Ablative facts negatived. Of any adequate ablative fact, the effect will be, in every case, to take away any right conferred by a collative fact. The affirmance of the non-existence of all such ablative facts must therefore be exacted, as well as the affirmance of the existence of a collative fact, as per No. III., and thence of a right to the effective service demanded as per No. I.

Ablative with relation to the pursuer's title to the service demanded by him, these facts will, with relation to the burthen imposed on the defendant by the obligation of rendering that same service, be exonerative.

In the case of a criminal offence, collative circumstances will be — the several inculpative, criminative, and aggravative circumstances, belonging to the description of the act: ablative, the several justificative, exemptive, and alleviative circumstances. For exact lists of all these several sorts of circumstances, see the Penal Code.

VII. Counter-evidence, if any, from what sources expected.

Counter-evidence is evidence either in disproof of a fact which, with reference to the pursuer's demand, is a collative fact, as per No. III.; or in proof of a fact which, with reference to it, is an ablative fact, as per No. VI.

VIII. Judicial service demanded. This will consist in the performance of all such judicial acts as will be necessary to the causing the collative portion of law, as per No. II., to receive, at the charge of the defendant, its execution and effect; and thereby the effective service, as per No. I., to be rendered.

DEMAND-PAPER E.

The demand either criminative or inculpative. Offence, suit and case, penal, and publico-private.

Heads under which the matter of a pursuer's demand is to be stated, for the purpose of the judge's determination whether to call upon any person, in the character of a proposed defendant, to comply with the demand or to contest it: —

I. Private pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex. — 2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married. — 3. Age. Time of birth, if not exactly known, according to conjecture; if exactly known, year, month, and day of the month. — 4. Birthplace, whether within or without the territory of the state; if within, mentioning the district, subdistrict, and bis-subdistrict. — 5. Occupation or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

Habitation to which a mandate, or other message from the judicatory, may be directed with assurance of its being received; the habitation being identified as per Election Code. On every change, the information under this head will have to receive a corresponding change.

III. Public pursuer, on behalf of the public — the government advocate.

IV. Effective services demanded at the charge of the proposed defendant.

1. By the pursuer, as being the individual wronged, — satisfaction; to wit, for the damage occasioned to him by the wrongous act, which, with respect to the right to satisfaction, has become the collative fact, as per No. VI., having been constituted such by the collative portion of law, No. V.

For the several shapes in which, for damage received, from the several sorts of wrongous acts or offences, satisfaction will be obtainable, see the Penal Code, under the head of the several sorts of offences against individuals.

2. By the government advocate, in his quality of public pursuer, — the subjection of the defendant to the punishment incurred by this same act.

By the suffering produced by the infliction of the punishment, a service is regarded as being rendered to the public, by means of the tendency which the eventual fear of it has to prevent the commission of the like wrongous acts in future.

V. Collative portion of law relied on.

This will be the portion of law by which the character of an offence is given to a sort of act, in which the individual act charged upon the proposed defendant, as contributory to the corresponding collative fact, as per No. VI., is comprehended. It is termed collative, in respect of its conferring on the respective pursuers, as per Nos. I. and III.,

the right to the respective services, as per No. IV.

VI. Collative fact alleged.

This will be an individual act, belonging to one of the sorts of wrongous acts spoken of under No. IV., and as being constituted offences by the collative portion of law, as per No. V.

Collative with relation to the title of the pursuers to the service, respectively demanded by them, — it will, with relation to the burthen imposed on the defendant by the obligation of rendering these same services, be onerative.

VII. Proposed defendant or defendants, with their several descriptions, as far as known or believed, together with the several means of intercourse with them respectively for the purpose of the suit, under the several heads in No. I. and II. mentioned.

VIII. Evidence looked to, in proof of the collative fact, as per No. VI.

Under this head will not be to be entered on this paper anything besides the *sources* of the evidence known, or supposed to be obtainable; to wit, such persons, together with such writings, and such other things, if any, as the pursuer looks to in that character for support to his demand.

The evidence itself will remain to be elicited at the hearing from those its several sources.

Notes to Demand-Paper A.

[Sources of Evidence.] On the evidence which will have to be adduced, will depend the belief of the judge in affirmance of the existence of the collative fact or facts, of which the applicant's title, on the ground of fact, to the services demanded by him, is composed. In relation to this same evidence, among the questions which, in that view, the pursuer will have had to put to himself, and whereby, in so far as he has failed so to put them to himself, the judge will have to put them, are the following: —

1. Questions as to *personal* evidence. What person or persons are looked to, as able and willing, or capable of being lawfully made willing, in quality of testifier, to prove the existence of the collative fact or facts? In particular — 1. The applicant or applicants? 2. The proposed defendant or defendants? 3. Any other person or persons? or any mixed assemblage, composed out of the three sorts of testifiers, whereof the two first will in such case be *litigant*, the others *extraneous*, testifiers or narrating witnesses?

2. Questions as to *real* evidence, — to wit, as to any state of things, unmoveable or moveable, to which it may happen to be capable of operating in the character of evidence, or proof, or explanation of a collative fact. The things, what and where; present possessors or keepers, who? In particular, the applicant or applicants — defendant or defendants — or third persons, as above? Note that, in respect of any appearance his body exhibits, *a person* may, as well as *a thing*, constitute a source of real evidence: a person, for example, on whose body the mark of a wound or bruise is visible.

3. Questions as to *written* evidence. Written evidence is a sort of compound evidence, composed of personal and real. To the questions, Who the persons are of whose discourse the writing is composed? will accordingly be to be added the question, Who the persons are in whose possession or keeping the portions of discourse in question are.

Of this note on the subject of evidence, the matter will be seen to apply, not less to the Demand Paper A, than to all the several others.

[Ablative facts.] By some one article in the list of the facts constituted collative facts with relation to the right or title of a pursuer (standing in the individual situation of the pursuer in question) to receive the services hereby demanded, must such his right or title have been conferred: by any one article in the correspondent list of ablative facts, it may have been taken away. Therefore, of all such ablative facts, the existence must of necessity be negatived by him.

Case I. Suit simply requisitive.

Of the proprietor of a mass of property, the death operates as a collative fact in favour of each of his postobit successors: as a collative fact, to wit, with relation to the right to the service rendered by the judge, by making a division of the mass among such successor and his co-interessees, and thereupon giving to him his share. Examples of an ablative fact are — 1. A release by any one such co-interessee in favour of the rest, or any one of them; 2. On the supposition of the deceased's having a correspondent right, exercise given by him to any ablative power, divesting this or that one of them of his right to any such share.

Notes to Demand-Paper B.

[Inculpative, but not criminative.] In this case will require to be included the case which, in Rome-bred law in general, and in Bonaparte's Civil Code in particular, is styled that of a *Quasi-delictum* — *Quasi-délit*, Cod. Civ. L. III. Tit. IV. Ch. II. Art. 1382 to 1386, p. 217. This is the case where, without any default of his own, a person is rendered responsible for damage — having for its efficient instrument some person for whom, or some thing for which, it is in such case thought fit to render him responsible: the person regarded as being in some sort in his power, and the thing completely so.

In this case, though it may be that by no

care on his part could the damage have been prevented, yet after the damage had taken place, he might have made or tendered compensation for it; and in this way it is, that though not criminal, his conduct may, perhaps not unreasonably, have been deemed culpable.

Under English law, the demand in a case of this sort is what is called *an action on the case.*

[Effective Service.] Warning against excess in the quantity or value of the effective service demanded.

1. Whatsoever, in a case of this sort, be the subject-matter of the demand, it will be for the joint care of the pursuer and the judge so to adjust the description given of it, that in case of non-compliance, non-attendance, and non-reparation on the part of the defendant, an *execution-ordering mandate* issued by the judge, may, without other description than what is so agreed upon, suffice to put the pursuer in possession of it. If for want of sufficient information respecting the facts belonging to the case, the pursuer cannot take upon him to fix the amount, let him write in the appropriate space the words, "*not yet ascertainable: remains to be ascertained from the evidence.*"

2. If, although the demand be, in respect of the collative fact, well grounded, the amount of the subject-matter demanded is, in respect of quantity or assigned value, manifestly excessive, the pursuer will be compensationally and punitionally responsible, in consideration of and according to the amount of the excess: the demand being to this amount ungrounded, and the exaction of the service having the effect of oppression and extortion.

3. By appropriate interrogatories, it will be the care of the judge to bring the statement respecting quantity and value to such a degree of correctness as may warrant his giving possession to the demandant, in the event of non-compliance on the part of the defendant, after an appropriate mandate received by him.

4. From the *defendant's* counter-statement, should any ensue, it will appear what is the object of his contestation: whether it is the applicability of the alleged collative fact, or only the quantity or value assigned to the subject-matter of the demand.

[Counter-Evidence, if any.] The pursuer, — does he know of any — can he think of any evidence, the tendency of which may, either in his own opinion, or, as he believes, in that of a defendant, be to weaken the opinion supported by the evidence adduced by himself, as above?

If any such counter-evidence exists, the earlier the mention of it is exacted, the better — the better for the parties on both sides. By the requisition thus made of it, the eyes of the pursuer are thus of necessity turned to the state of the case as it must have presented itself to the other side; and by the comprehensive view thus taken, the ulterior vexation and expense of the suit may be saved to himself, as well as the whole of it to the defendant, after being thus interrogated.

If, knowing of any such counter-evidence, he omits to furnish indication of it, the omission will be circumstantial evidence of *evil consciousness;* and, in addition to other evidence, will of itself constitute sufficient ground for a dismissal of his demand: and it may moreover be punishable in the character of a separate and substantive offence; to wit, falsehood, mendacious or temeracious, as the case may be.

To counter-evidence, apply of course the same distinctions as those which as above have place in the case of evidence.

The facts to which the counter-evidence applies, may as well be those which, with relation to the pursuer's title, bear the relation of ablative facts, as those which bear to it the relation of collative facts. If they are collative facts, the tendency of it will be, either to disprove in a direct way the existence of them, or to cause to be regarded as unreasonable the inference deduced in affirmance of them from the evidence on that side: if ablative facts, the tendency of it will be to prove the existence of those same ablative facts.

[Counter-demand, if any.] Reasons for inquiry under this head, are the same as in case of counter-evidence. Sub-heads for inquiry, the same as in the case of the *demand*, as above.

[Judicial Service.] Under this head will be comprised whatsoever chain of operations may be necessary to be performed by the judge, ere the effective service, or some succedaneum to it can have been rendered to the pursuer. These operations, or *elementary judicial services*, as they may be called, will be the result of the exercise given to the several distinguishable functions brought to view in the Constitutional Code, Chapter XII. Judiciary, Section 9, *Elementary Functions;*— the last link in the chain being constituted by the exercise given to the imperative function, by means of the mandate or mandates by which execution and effect is given to that portion of the law, which the pursuer's demand has in this case for its ground. To bring to view these operations, in all the varieties of which they are susceptible, will be the occupation of the remainder of this same Procedure Code

[Ablative Facts.] In the case of a wrong,— an inculpative fact on the part of the proposed defendant, (thence a collative fact, with relation to the pursuer's right or title to satisfaction at his charge), is an act of the sort

of those which, by the law in question, are constituted offences, unless accompanied by some one of the circumstances included in a correspondent list of justificative or exemptive circumstances. If any such ablative fact has place, his title to the service in question has no place. If of any such ablative fact the existence be known to him, he is in a state of *evil consciousness* with relation to his demand — consciousness of the invalidity of it, and of the groundlessness of the vexation he is seeking to impose on the defendant; and this state of evil consciousness as to the application he is making, involves in it an act of *insincerity*, for which he may as reasonably and beneficially be punished, as for mendacious evidence in relation to any *external* and *physical* fact. As to this matter, see what is said in relation to counter-evidence.

[Proposed Defendant,] to wit, the person at whose charge the services, effective and judicial, are demanded — who would be the sufferer by their being rendered — and who accordingly, by a corresponding interest, is urged to oppose their being rendered. To the pursuer, this person may be either known or unknown: if unknown, the application cannot as yet be anything but *informative; contentious* it cannot be termed, unless and until, by means of appropriate arrangements taken by the judge for the discovery of the person, a *contestation* with him is commenced. The case in which he is thus as yet unknown, will most commonly be a penal one, that being the sort of case in which, with a degree of force correspondent to the magnitude of the suffering produced by the obligation of rendering satisfaction — or by the punishment liable to be undergone, or by both as the case may be — his interest will be urging him to keep himself from being known. By accident, however, this latentcy may have place in a case where the suit is simply requisitive, as to which, see Demand Paper A; as also, in any case, whether inculpative or not, in which, by the contemplation of the inconvenience attached to the fulfilment of the obligation endeavoured to be imposed upon him, he is prompted to evade it.

NOTE TO DEMAND-PAPER D.

[Evidence.] In a penal case, whether the offence and the species of suit are, as here, *purely public*, or whether they are *publico-private* as in the case of the Demand Paper E, the evidence will commonly have three distinguishable subject-matters; to wit — 1. The matter of fact, or state of things, regarded as productive, or tending to be productive of mischief, and supposed to have been the result of the *act* of some human agent; 2. The nature of that same act; 3. The personality of that same agent.

Of these three distinguishable subject-matters of knowledge and evidence, the first may be known, while the second and third are as yet unknown: of damage produced by conflagration, the existence may, for example, be known, when, as yet, it is not known whether human agency bore any part in the production of it. So again, the damage being known, what may also be known is, that human agency, the act of some person, had part in the production of it, while as yet it is not known *who* that person is.

In Rome-bred law, the state of things regarded as fraught with mischief, with the circumstance of its having had human agency for its cause, constitute together what is called the *corpus delicti* — in French, *corps du délit, the body of the offence;* and are frequently spoken of as composing a subject of evidence and investigation, distinct from the consideration of the personality of the supposed criminal, or culpable agent.

This distinction may also have place, in several modifications of the case, in which, as in Demand Paper B, the suit, whether inculpative or not, is not criminative.

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§ 5. *Pursuer's demand, how amendable.*

As in this stage, so in any subsequent one, the ground of the demand, as stated by the pursuer to the defendant, may at any time be changed, and so *toties quoties*. At this stage it is producible in the case where, at the time of his application, the pursuer adduces and has obtained the examination of an extraneous witness.

If the case be such, that the pursuer in his situation might have foreseen the superiority of aptitude on the part of the second, or say amended ground, in comparison of the original ground, he will be compensationally responsible to the defendant for any disadvantage by the change produced to him in respect of any of the ends of justice: if not, the burthen must rest upon the defendant uncompensated.

Of amendments of this sort, the need has its principal source in the variations which, with or without evil consciousness, or even temerity, may have place, and are continually having place, between any account that may have been given by a witness to a pursuer extrajudically, and the account given by the same witness judicially, while under examination.

Various are the causes by which such variance is capable of having been produced, such as —

1. Difference in respect of the sense of responsibility between the one occasion and the other. On the extrajudicial occasion, responsibility in respect of verity, none; and on the other occasion, the responsibility maximized.

This cause is the most powerfully operative, and accordingly the most obvious.

2. Difference between the state of the memory on the one occasion, as compared with the other. Here comes in the operation of two antagonizing causes. On the first occasion, the recollection being in its freshest state, is naturally more clear, correct, and vivid. But on the second occasion, the demand for the operation of recollection having intervened, the attention bestowed will naturally have been more intense, and by this means any deficiency, which for want of attention may have had place in the statement made on the first occasion, may have received supply.

Here, by the bye, may be seen how vast the importance of the avoidance of delay may be, and commonly will be, in reference to the direct, as well as to the collateral ends of justice. By every day of unnecessary delay, addition is made to the probability of ill-success to him who is on the right side; to the probability of good success, to him who is on the wrong side.

The points in relation to which the need of such amendment may have place, are the following: —

1. Ground of the demand, in point of law, as per Table of rights and Table of wrongs, and the chapter and section of the code to which the case belongs.

2. Place at which the fact in question happened.

3. Time at which the fact in question happened — at which the state of things in question had place — at which the act in question, positive or negative, was performed.

§ 6. *Commencement of suits — English practice.*

The establishment of eventual forthcomingness and responsibility, on the part of applicants, will be seen to be a business of no small intricacy and difficulty, when provided for, as it must be, on an all-comprehensive scale. It is a business for which, under the current systems, there is no demand, and which, to those whose whole experience and attention have been confined to those systems, will be apt to appear superfluous, and no less trifling than troublesome. The defects of those systems under this head have two causes, varying according to the nature of the case: —

If the suit be a non-penal one, no person is received to state his case in his own person, unless it be with a professional assistant at his elbow: in England, in particular, matters are so ordered, that while, by the instrumentality of a professional assistant, any person may institute a suit of this kind against any person for anything, or for nothing at all, — no person, even if by miracle he could, without that instrumentality, contrive to institute any such suit, could even by any such miracle institute it in the presence of the judge. In England, in particular, the judge keeps open a shop, at which, on payment of a fixed sum, without so much as supposing himself to be in the right, any man may purchase the assistance of the judge, towards ruining any other man; the judge by purposed ignorance, escaping from all responsibility for the misery to which he gives birth, and from which he profits. As the party cannot thus buy his chance for justice, otherwise than by the hand of a professional assistant, the lawyer will not lend his assistance, unless, in his view of the matter, he has sufficient security for the costs, his own pay included; and thus all such trouble as that of inquiring into the circumstances of customers is saved to the judge.

To lawyers of all sorts and sizes, thus is convenience maximized. To non-lawyers the consequence is, that he who has not wherewithal to pay for a ticket in the justice lottery, in the character of plaintiff, goes to a certainty without justice; and in this situation are at least nine-tenths of the whole population; while, in the character of defendant, he who cannot pay the costs of defence, is, in every instance, between plaintiff and lawyers, consigned to complete and certain ruin, without possibility of escape. The judge, having taken care to know nothing about the matter, being thus as completely guiltless of the misery he has produced, as a murderer would be of murder, by shutting his eyes while the bullet was doing its office.

In a penal case, the matter stands on a different footing. Judges themselves could not save themselves from having their houses broken open, if the applicants were not received, as indiscriminately as here proposed, to give information respecting the most highly punishable class of criminal offences. But here, too, the judge of the highest rank makes his escape from responsibility and trouble in every shape: the troublesome part of the business is committed to an underling, who may be occupied about it for days, while a small part of the day is all that is occupied by the great judge, matters having been brought into preparation for that purpose.

Meantime, not small is the degree of convenience provided for the underlings. If the individual accused by the information given, is one whom nobody knows, — the information being upon oath, the oath is sufficient warrant for immediate incarceration, without any such trouble as that of an inquiry into the trustworthiness of the informant.

But now, suppose the individual accused to be one whom everybody knows. In this case, there is no degree of solicitude but what will naturally be employed in the inquiry into the trustworthiness of the informant.

§ 7. *Judication without audition, Anglicé — its absurdity.*

If, without knowing or hearing a word about the disorder of the patient, the physician were to pour down his throat a dose of physic, or the surgeon lay hold of him and bleed him, they would do exactly what, in cases called civil ones, the legislature and the judge do, in the first instance, by the defendant at the commencement of a suit under English law. What they have never cared about, is how much the party will suffer from what is done: what they have always cared about, and what is all which at any time they have cared about, is the money and the power: the money they thus receive, and the power they thus exercise.

Under the English system, in those judicatories which are called common-law courts, in contradistinction to equity courts, — if the defendant fails as to the contesting the demand in proper form, the plaintiff obtains in his favour what is called a judgment; but a judgment on which, without a further proceeding, under which the evidence belonging to the case is elicited, nothing can be done. This proceeding is performed in virtue of what is called a writ of inquiry: the judge being, not the judge of the judicatory in which the suit was begun, but a subordinate functionary called the sheriff, by whom, had the inquiry been made in the presence and under the direction of the judge, simple execution would have been given to the judgment then pronounced.

This lot of factitious delay, vexation, and expense, has for its cause what may be called the *judicial-ignorance-maximizing principle*, or *thought-saving principle*, — that principle which has for its object the giving to the judge his profit out of the suit, with the least expense possible on his part, in the articles of time, labour, and thought. Of the number of the suits of which in a twelvemonth the judge by his signature pretends to have taken cognizance, only in the case of some small proportion has he, from first to last, known anything at all about the matter; and thus, in the great majority of cases, the money exacted by the judges (for five is the number of those employed in doing nothing or worse than nothing) is so much obtained on false pretences: an offence punished in the case of mean evil doers, and punished by those same judges, with what is called transportation for seven years, — that is to say, banishment and confinement to hard labour for that time.

Go to a common-law judicatory, you thus get decision without thought and without effect. Go to an equity judicatory, you get thought, or at least prate, without decision: prate in plenty, with years of delay between prate and prate. Thus has it been now for more than twenty years past, ever since the country has been afflicted by Lord Eldon.

CHAPTER XIII.

DEFENCE, HOW ELICITED.

§ 1. *Modes or shapes.*

Complication will be here presenting itself in appalling abundance. The best remedy, imperfect as it cannot but be, — carelessness would join with unscrupulous hostility in denouncing as the cause of the disease.

Parties, each at the same time, pursuer and defendant, one or more in every judicial territory: to each party a swarm of witnesses. Such is not only the conceivable but possible nature of the disease: happily, it is not a frequently exemplified one.

As to the here proposed system, so far from creating additional evil in the shape of misdecision, delay, expense, or vexation, it provides new and manifestly efficacious securities against evil in all these several shapes. These are — to wit 1. The universally-extending responsibility in case of falsehood; 2. The universal exposure to subsidiary oral, after epistolary examination.

To English practice, neither do these, any more than any other class of cases, ever present the smallest difficulty. Be the gordian knots ever so complicated and ever so numerous, in the hand of chicane is a sword, by which difficulty in every shape is cut through without difficulty. Whatsoever statements, demandative or defensive — whatsoever evidence the nature of each case calls for — all are elicited in one or other of the two most deceptious, most untrustworthy modes that human ingenuity could have divined: — affidavit evidence and secretly-elicited responsion to a system of interrogatories framed in the dark; and epistolary responsion, incapable of being followed and purified by oral interrogation; — modes having for their object the sinister emolument of their contrivers, and for their instrument a galaxy of perjuries. When the division of the sweets commences, in the place of creditors, come in the two classes of self-created harpies, the judge in all his forms, and his instrument and dependant the professional lawyer in all his forms. The filth of the harpy finds, in the mixture of mendacity and absurdity poured forth from their lips and from their pens, its not unworthy representative: the money they fly off with — the defiled paper and parchment they leave in lieu of it.

As to parties, witnesses, and their sufferings, the same sort and degree of regard do they find in the breast of the authors, as do those of the negro in that of the planter — those of the Hindoo in that of his English proprietor — those of the Irish Catholic in

that of the Orangeman — those of the non-religionist and rival religionist in the imagination of the religionist. Sufferings, which a man neither feels nor sees, cannot be too great: as to those which are seen by him, by some they are seen with pain, by others with indifference, by others again with delight.

Where, having nothing to gain by deviation from any of the ends of justice — nothing to gain by misdecision, delay, vexation, and expense, and at the same time everything to suffer from it at the hands of the legal and public-opinion tribunals, with the light of publicity shining in full splendour upon his every word and action, — it were strange indeed if more were not done by the judge towards lessening the evils opposite to the ends of justice, than if motives for the endeavour to lessen them were altogether wanting; — still stranger if more were not done by him than can reasonably be expected to be done by judges whose interest it being (for such their predecessors have made it) to maximize the mass of those same evils, it has of course been a constant object of their endeavour, — the end in view of all their operations.

Thus circumstanced, under the English system, have been the whole hierarchy of the judges of the higher order: subject only to here and there a slight and narrow amendment at the hands of the acknowledged legislature (of which they were all along themselves the oracles,) the system of procedure has always been under their direction, in the double capacity of effective legislators and judges: judges applying the law — that very law which, on pretence of *declaring* it, for this is the cant word, their predecessors and they themselves have all along used, — declaring that to have existence, which even in and by this very declaration, is declared not to have been made by anybody. Not by the legislature: true; and thus much must be allowed, though it is they who say it. But, according to them, neither is it by themselves that it is or has been made; though, if not by themselves, by whom else can it have been made?

In the whole system may be distinguished, for this purpose, three chief modes of procedure: the common-law civil, the common-law penal or criminal, and the equity mode. In no one of them (except for the purpose of lucrative contribution) is any real regard actually paid to the direct ends of justice: in no one of them, in the regulations established, is any regard so much as professed, or pretended to be paid, to the collateral ends of justice.

Bribe-taking, which is out of the question — bribe-taking is never practised, it not being safely practicable: not being imputed to them, how is it, it may be asked, that they are gainers by misdecision? The answer is, — in one vast class of cases, one gain they can make, and at all times have made — by favouring a party which it was their interest to favour — and that is, in causes in which government takes an interest in the side on which government is — that government of which they themselves are such actively efficient and highly interested members.

But as to the practice of misdecision, another interest they have, which, though not so manifest, is much more extensive in its application and operation than that just mentioned. This is, the effect of misdecision in the production of uncertainty. It is on the uncertainty that they depend, in a great measure, for the whole assemblage of their insincere, their *malâ fide* customers, so far as regards the question of law. Were the state of the law known to all, no one, unless on the ground of knowingly false evidence, would venture to institute an illegal claim, or defend himself against a legal one. But having so arranged matters, that he who is rich enough to pay the price is sure of success against all those whose pecuniary means are to a certain degree inferior to his own, the greater the number of chances of success which, by the adjective law of their own creation, they have given to those against whom the substantive branch of the law has expressed itself, or has been thought to express itself, the greater the encouragement for them to engage in a groundless and unjust pursuit, or in a groundless and unjust defence, as the case may be.

This policy of theirs has, as it were, betrayed itself by an expression which could not be prevented from growing into use: this is that in which the ground of decision has been distinguished into two modes; decision according to the merits, and decision not according to the merits. Now as to these two, the expression in cases decided otherwise than upon the merits, may serve for indication of all the cases in which, either for an individual benefit in the shape of corruption, to the individual judge then deciding, or for the aggregate benefit of the profession, — misdecision has been exemplified — injustice knowingly and wilfully committed. Decision otherwise than on the grounds of the merits is, in other words, decision on technical grounds. The decision on technical grounds will, so long as it remains, remain a permanent and inexhaustible spring of safely commissable, and committed injustice: for the technical rule being palpably repugnant to justice, the judge at all times has for choice, the choice between adhering to the unjust rule, and so favouring the one side, or departing from the rule, and so favouring the other.

In the common-law mode, to wit, in the case of jury trial, all the witnesses on both

sides are brought together at once, at the same hours on the same day, and thus the maximum of dispatch, it may be alleged, is secured. But supposing this to be the case in general, no advantage would be given by it over, and in comparison with, the here proposed mode. Why? Because, in every instance in which the end is really the end conducive to justice, it may, and naturally will, be employed in the here proposed mode; whereas, whenever that at present established mode is not conducive to, but opposite to, the ends of justice, be the opposition ever so strong, it cannot but be employed.

In the established mode, the interval of time between the commencement of the suit and the delivery of the evidence, must be that which is necessary to let in that piece of evidence, the elicitation of which will require the largest portion of time: and during the whole of this largest portion, all those pieces of evidence which might have been elicited in smaller portions of time, must remain unelicited. One consequence is, that the greater the portion of time, and the greater the number of witnesses whose testimony is requisite, the greater is the probability of the deperition of evidence: of a result, by which injustice may be inevitably and irremediably substituted to justice.

Effects and fruits, the causes of this regulation, many, for Judge and Co.: money obtained on some occasions, some of it on grounds which may be true or false as it happens; on others, by pretences which are constantly and certainly false. On some occasions, on application made, order for enlargement follows of course. In these cases, what is done for relief of the party, is done by Judge and Co. for money obtained by them on false pretences. The act pretended is an application made to the judge: of no such application, individually taken, does the judge ever hear: parties to the fraud, the attorney who instructs the barrister to make a motion — *i. e.* an application to the judge—and the barrister who pretends to have made it. By this fraud, 10s. 6d. is gained by the barrister, somewhat less by the attorney; the barrister writing his name for the money, the attorney having previously written a few words more. By this fraud, which the suitor is made to pay for, he is saved from the burthen, whether of compensation or punishment, which otherwise would be imposed upon him by the judge; the judge, by the fear of that burthen which otherwise would to a certainty be imposed, extorting from the suitor the money thus thrown by him into the hands of these his partners.

In the judicatories which act under the name of equity, this union of fraud and extortion is at the same stage of the suit repeated once or twice, as a matter of course.

In one particular, all these modes agree: for every operation, by whomsoever performed, an allowance of time is fixed by general regulation. By this generality, a negative is thus put upon the very idea of having any regard to the convenience of any one individual on either side In each individual suit, the chances are as an unlimited number to one, in favour of injustice, to the damage of one side or both: if it is too short, the party who is in the right has not time enough to do that which is necessary to the manifestation of his right; and here comes the injustice which is opposite to the direct ends of justice: if too long, *i. e.* longer than is necessary for the manifestation of his right, here, by the amount of the excess, comes delay — delay to the prejudice of the collateral ends of justice: and from delay comes vexation, with more or less probability of expense.

When on any special ground, true or false, more delay is desired, money in much greater abundance is extorted. An application to the judge is really made: evidence to support the allegation — a mass of written evidence, is tendered to his cognizance: the evidence is penned, not by the individual—him whose statement it contains — but by an attorney bywhom it is licked into a form deemed suitable to the occasion and the purpose: along with this evidence, goes an account of it—a sort of comment on it, drawn up likewise by the attorney. This comment is called a brief, and is delivered to the advocate. The application thus made may be opposed by a counter-application from the other side, drawn up in the same manner; and thus, out of the belly of the principal suit, is bred an incidental one.

Even within the bounds of the kingdom of England, not to speak of united kingdoms and distant dependencies, the distance of the abode of the suitor from the judgment-seat, varying from a few feet to little less than three hundred miles, — from this circumstance may be formed a judgment what sort of regard in the establishment of these time-fixation rules, was paid to the convenience of the people in quality of suitors, and of what sort was the motive which in the establishment of them constituted the final, and thence the efficient cause.

The demands for postponement being throughout the process multiplied partly by nature, partly by ingenious industry, and under the name of vacation, vast intervals of relative inaction having been most impudently established — suits in unlimited abundance are thence to be crowded by regulation, into spaces of time incapable of holding them: suits are thus put off, from year to year, every interval being a gulf in which the for-

tunes of the least opulent of the contending parties is swallowed up: iniquity being triumphant in the person of the most opulent.

For the sowing of these regulations, the seed of which all the money was the fruit — the originally-looked-for and continually-gathered fruit — it was necessary to prepare the ground. The grand operation by which this preparation was effected, was the regulation by which the parties on both sides are in every possible case kept as far as possible excluded from the presence of the judge.

Suppose the applicant in his presence,—to the extent of his knowledge and belief, any matter which presents a demand for consideration for the purpose of the suit, may be extracted from him at that one hearing; and thus a plan of operations for the conclusion of the suit, with the greatest probability of rectitude of decision, and with the least delay, expense, and vexation, may to the best advantage be formed at this early stage, which by this means will in many instances be made the last stage, and in many more the last but one.

Here would have been the maximum of appropriate knowledge—of the knowledge of those things, the knowledge of which is necessary to justice. Shutting the door against this salutary knowledge, the contrivers of the system, by this one operation, flagitious and daring as it was, endowed themselves with that ignorance — that happy, because thenceforward necessity-begotten, and thence irreproachable ignorance — which presented an excuse and served them as a veil for all the depredation and oppression which was the fruit of it. For the exigencies of individuals no provision was thenceforward made. Why not made? Because the knowledge of them was not possible. And why not possible? Because, by these judges themselves, care so effectual had been taken so to order matters as to prevent it (and that so long as the system founded on in it lasted) from being possible.

§ 2. *Defence, how procurable.*

Generally, the place of defendant's accersition and examination will be the *originating* judicatory.

This, exceptions excepted, will be at applicant pursuer's choice. But restrictions are necessary to prevent overloading.

Reason 1. Certainty of it being the most convenient to

1. Applicant.

2. Not certain its being less so to any one else.

But only in *one* can the suit be *terminated.* Thence, special preponderant inconvenience excepted, the best is the *originative.*

Sole reason for transfer, incidental or definitive, to a *post originative* judicatory, — diminution of delay, expense, and vexation, attendant on the accersitee's *journey* and *demurrage.*

From this the danger of misdecision would not be diminished but increased.

Causes of increase of delay, expense, and vexation in this case: —

1. No day for defendant's next attendance could be appointed by the judge originative: for the first could not know when the second would have relative leisure.

2. No day, till in consequence of a *correspondence* between him and the judge post-originative.

3. No determinate information could be given to the pursuer, as to the time of defendant's statement and testimony in this case.

Nevertheless power to judge originative to make transference, incidental or definitive, to a judge post-originative, for special reason, referring to delay, vexation, and expense.

When the party addressed is not adducted or accersed to the original judicatory, if oral statement or evidence is required (domiciliary or topographical excepted,) it must be at another, say a post-originative judicatory: *pro tanto*, here then will be *transference.*

Hence unavoidable addition to delay, vexation, and expense — especially in case of retromission.

Cause and measure of the increase: distance between the judicatories.

Cause of multiplication: multiplicity of persons accersible, whether defendants, copursuers, or witnesses.

Judge of the originative judicatory cannot make known the earliest time of relative leisure in another, as in his own judicatory, and not at all without previous correspondence.

For obtaining statement and evidence, where the parties are *many:* the most eligible mode, *epistolary* backed by *subsidiary* oral.

The subsidiary may be either — 1. On the original inquiry; or, 2. Reserved for the recapitulary ditto.

The defendant not being at the time in question present in the judicatory, the epistolary is the only mode which, in the first instance, the nature of the case admits of; to wit, by missives sent to the defendant from the judge. Remains for consideration, in which mode the defendant shall, in the first instance, on receipt of such missive, address the judge. If in the oral mode, it will be by attendance at the judicatory.

Where the originating judicatory is the judicatory of all parties on both sides, the mode of subsequent judicial intercourse will be the oral mode.

The epistolary mode is the most conducive to the *collateral* ends of justice in the following cases: —

1. Expatriation; 2. Subsequent judicatory too distant for accersition to the originative.

When a day is fixed for the defendant's attendance at the judicatory, — required by the mandate in the meantime, if the time admit, will be —

1. A defendant's response paper, promising attendance on the day prescribed, or making excuse as to the day, and offering attendance on another day therein mentioned.

2. A defence paper, in a form correspondent to that of the demand paper.

Evidence self-serving, or self-disserving, or both together, to be delivered in the epistolary mode, will at the same time be called for, or not, as to the judge may seem most conducive to the ends of justice.

Of the matter thereupon received from the defendant, communication will be made by the judge, if time admit, to the pursuer or pursuers, that on the mutual hearing, he or they may be better prepared.

Examples of the matter of the appropriate response at the maximum of simplicity, are —

1. Defendant's acknowledgment or denial of a document purporting to be his, whether in *his* handwriting or not.

2. Ditto of a statement supposed to be orally uttered by him.

3. Ditto of the receipt of a missive.

4. Ditto of a death with circumstances, as per demand paper.

5. Ditto of a birth with circumstances, as per ditto.

§ 3. *Defendant's attendance — its uses.*

Of a defendant's ,personal attendance at the judgment-seat, among the purposes or uses are the following : —

I. Uses to the Pursuer's side :

1. Furnishing appropriate confessorial evidence.

2. Furnishing indicative evidence of ditto.

3. Furnishing information of means of effective responsibility at his charge, satisfactional or punitional, or both, as the nature of the case requires and affords.

4. Furnishing means of co-enduring accessibility on his part for the purpose of the suit.

II. Uses to his the Defendant's side :

1. Furnishing his own appropriate self-serving evidence, if he has any.

2. Furnishing indicative evidence as to expected extraneous appropriate evidence, expected to be in his favour, and obtaining mandates for the elicitation of it; to wit, either contesting the pursuer's *collative* facts, or establishing facts which, with reference to his title, are ablative.

3. Furnishing the opportunity of applying counter-interrogation to the pursuer, in respect of his self-serving evidence.

4. Furnishing an opportunity of eliciting the pursuer's response to his (the defendant's) counter-demands, if any such he has : and his own self-serving evidence in support of them.

5. Furnishing to the defendant an opportunity of eliciting the evidence of the extraneous witnesses attending on his side, if any such there be.

6. So of counter-interrogating the pursuer's extraneous witnesses, if any such there be.

III. Uses to both sides :

1. Furnishing to both the faculty of settling, for ulterior proceeding, the course most convenient to both.

2. Faculty of receiving and profiting by any such advice as, for their mutual benefit and that of the public, the judge may see occasion to give.

3. In particular, receiving from him any such information and advice as may guard them against the propensity and endeavours of professional assistance to add to the unavoidable expense, vexation, and delay, factitious ditto, for the sake of the profit upon the expense.

4 Obtaining relevant testimony, without being dependent for it on the good will of the percipient witnesses, or other persons capable of yielding it.

Note here, how favourable this means of mutual explanation is to the interests and desires of the sincere — how adverse to those of the insincere suitor, on both sides ; thence how adverse to the sinister interest of professional advisers and assistants, by proportionally depriving them of the custom of the persons who would otherwise be insincere litigants.

Hence the cause why, in all systems of procedure, more or less, endeavours so anxious and successful have been employed in keeping the parties from coming into the presence of each other, together with that of the judge.

§ 4. *Consideranda.*

To be considered at this stage as to communication for the judicial purpose, are — Ends to be aimed at, and the nature of the suit.

1. *Persons* to be communicated with.

2. *Purposes* for which they may be respectively to be communicated with.

3. *Communicaters* or *addressers*, — persons *by* whom, for those purposes respectively, communication may require to be made.

4. *Addressees*,—persons *to* whom the several communications may respectively require to be made.

5. *Operations* which on the occasion of the several communications may require to be performed for those several purposes.

6. *Instruments*, or say written *forms*, which for the performance of those several operations, may respectively require to be issued.

7. Correspondent considerations in regard to things moveable and immoveable.

Persons who, for judicial purposes, at this stage may need to be communicated with :—

1. Pursuer's co-interessee or co-interessees, on his side as proposed co-pursuers.

2. Proposed witness or witnesses on pursuer's side.

3. Proposed defendant or defendants.

Purposes as to proposed co-pursuers :—

1. Delivery of their demand paper.

2. Settling with each other the proposed purport and tenor of those their demands.

3. Settling with one another and the judge what next course shall be taken as to communication with proposed pursuer's witnesses and defendants.

4. Settling who to apply to as proposed witnesses.

5. Settling the most convenient mode of communicating with them for that purpose.

6. Settling whether, as to the defendant, any and what means of preliminary security are necessary.

Note, that of any such co-interessee and proposed co-pursuer, the existence is matter of accident, and in most instances will not have place.

Proposed witness, viz. such only whose capacity of testifying is supposed known to original pursuer or co-pursuers.

Purposes : —

1. Sending to him a witness's attendance mandate ; or else,

2. A witness-examination mandate.

3. Receiving from him in either case a witness's compliance announcing response.

4. Or a witness's excuse paper ; or,

5. A witness's testificative response ; or in case of attendance,

6. Receiving him, and examining him on his attendance.

7. In case of necessity, causing him to be prehended and adduced for the purpose of examination ; to wit, by a witness's adduction mandate, delivered or sent to an appropriate functionary — a prehender.

By proposed witness, understand also holder of written or other real evidence, required to be adduced or transmitted.

Proposed defendant — say one.

Purposes : —

1. Sending to him a proposed defendant's compliance, or defence and attendance-requiring mandate.

2. Receiving from him a compliance-announcing response ; or,

3. A defence paper, with an attendance-announcing response ; or,

4. A defendant's excuse paper.

5. Receiving and examining him on his attendance.

6. In case of his being examined in the epistolary mode — in addition to his defence paper, his defendant's testification paper.

7. In case of necessity, causing him to be prehended and adducted for the purpose of examination by a defendant's adduction mandate, delivered or sent to a prehender, as above.

Whether it be the effect to be produced and the operation to be performed, ultimate execution to be given to the laws, and service demanded thereby rendered — preliminary security to be afforded—counter-security to be afforded — testimony to be elicited; — and for all these several purposes, intercourse with justiciables and judicial functionaries commenced and carried on, — the endeavour of the judge will be to combine with the maximum of efficiency and the maximum of promptitude (or say the minimum of delay,) the minimum of vexation or afflictiveness, including the minimum of vexatious expense.

Cæteris paribus, that mode of operation which is most prompt will be least afflictive. To the pursuer's side it will manifestly be most beneficial. So likewise to the defendant's side, except in so far as by delay in respect of the rendering the service due, he is served at the expense of the pursuer and of the interest of the public in respect of justice.

Middle agency the judge will take care not to employ without necessity. By every middle agent unnecessarily employed, chance of ultimate failure is increased — delay certainly increased — and either vexation to the agent, or expense in satisfaction for it, increased.

In particular, where, to the loss of any person — a defendant for example — property is to be transferred, he will make *graphical* transfer of it with his own hand, without compelling the defendant to be instrumental in the transference or conveyance. Compulsion may be necessary to produce disclosure: it cannot be to effect graphical transfer.

Of the options which the judge will thus have continually to make, he will all along give the reasons. In particular, where of divers courses for efficiency, he holds himself obliged to employ the most afflictive.

Having obtained from the applicant the appropriate grounds,—before the termination of the first hearing, the judge will have determined, as far as may be, and communicated to the applicant the particulars of the ulterior course.

In case of retention, he will in the first case determine whether any and what preliminary measures of security are requisite to be taken, according to the nature of the suit, for securing execution and effect to the law.

At the same time, whether then to commence intercourse with the defendant ; or antecedently, whether with any and which of the persons following : —

1. If the applicant be a proxy, the principal or principals.

2. Whether a proxy or the principal, any and what co-pursuer or co-pursuers.

3. Any extraneous witness or witnesses, for the purpose of eliciting their respective evidences.

With the defendant and defendants (without waiting for responsion from any other persons, or service from them in any other shape as above,) he will, bating special reason to the contrary, commence holding intercourse.

No such intercourse will be commenced, unless from the applicant's statement, made under responsibility, the judge is satisfied that, taking it for correct, he will be justified in the exaction of the *service* demanded, if neither compliance with the demand nor response contesting the justice of it be received, after adequate evidence of the receipt of the mandate to that effect.

On this ground, with or without preliminary measures of security as above, he will address himself to the defendant or defendants, commanding either immediate reddition of the service demanded, or responsion at the judicatory or elsewhere, by means of an appropriate *defence* paper contesting the justice of the demand.

CHAPTER XIV.

SUITS, THEIR SORTS.

§ 1. *Suit, what.*

A SUIT (meaning a suit at law) is a course of action commenced on application made to some judge, requesting his efficient service for the giving execution and effect (contestation notwithstanding) to some determinate portion of law.

By every suit, a person constitutes himself pursuer; another, in case of contestation, defendant: *thence*, *sides* at the least two, pursuers and defendants in any number.

By every suit, two services are requested, principal and instrumentary: principal by the defendant; instrumentary by the judge, in causing the principal to be rendered.

Active or passive may be the principal, the defendant's service: — active, where for the rendering it, motion on the part of the defendant is necessary; as in paying money, performing manual labour: passive, as in suffering money or goods to be taken out of his possession, or his body to be imprisoned.

Active is always the instrumentary, the judge's service. In it are comprised of course as elementary services, all those necessary to the removal of obstructions to the rendering of the principal service — all such services as well on the part of the judge, as of all persons who, for purposes of this kind, are by law under his command.

§ 2. *Sources of distinction.*

From divers sources of distinction, divers sorts of suits, viz. —

1. Manner in which defendant may be affected: suits non-penal and penal.

3. Multitude of the objects brought to view: suits simple and complex.

3. Duration: suits summary and chronical.

4. Dependence or independence as to another suit: suits original and excretitious.

5. Number of sides complete as above, or incomplete, two or one only: suits ambolateral and unilateral; unilateral, viz. either

1. Without pursuer, or
2. Without defendant.

The judge supplying the place of each.

§ 3. *Non-penal and penal.*

Suit non-penal* has not for its object the producing on defendant's part, suffering other than that inseparable from the obligation of rendering the service demanded; that service not consisting in suffering, for the purpose of punishment. Suit penal has for its object the producing the service rendered by suffering punishment.

Suit, when penal, is either purely public, or publico-private: purely public, where, no wrong being done to one individual more than another, none has need of the service rendered by satisfaction for special wrong: publico-private, where, wrong having been done to an individual, or to a class less than the whole community, service by satisfaction is needed and demanded accordingly. Of the service rendered by suffering punishment, no individual having more need than another, the pursuer, if any, must be a government agent, say *a government advocate*.

In this case, the satisfaction is demanded by the private, the punishment by the public, pursuer.

As to the government advocate, see Constitutional Code, Chapter XII. *Judiciary collectively*.

§ 4. *Simple and complex.*

Suits simple and complex. In the case of complexity, for the standard of comparison, take the most simple conceivable.

Exemplification in the case of a non-penal suit: —

1. Subject-matter, — one; say a horse, claimed by pursuer of defendant.
2. Pursuer, one.
3. Defendant, one.
4. Evidence on pursuer's side, — witness one, the pursuer.
5. On defendant's side, — witness one, the defendant.

* [Non-penal.] *Civil*, why, though customary, not *here* employed? Answer: It is ambiguous, meaning *non-penal*, *non-military*, *non-ecclesiastical*, or *non-canon*.

In the case of a penal suit —

1. Subject-matter, a horse as above; but now alleged to have been stolen.

2. Pursuer one, say the government advocate.

3. Defendant one, the alleged thief.

4. Evidence on the pursuer's side, — witness one, as before, the pursuer.

5. Evidence on the defendant's side,—witness one, the defendant.

Examples of sources of complexity: —

In a non-penal case —

1. Multitude of pursuers.

2. Multitude of defendants.

3. Multitude of pursuer's evidences.

4. Multitude of defendant's evidences.

5. Complexity of the subject-matter of demand.

6. Multitude of elementary services comprised in the nature of the principal service demanded; as in the case of an account with many items.

7. Multitude of elementary collative facts, necessary to constitute one effective title.

8. Multitude of counter-demands or set-offs on the defendant's side.

In a penal case —

1. Multitude of defendants, *i. e.* alleged co-offenders, in respect of conjugated mode of delinquency; to wit, instigation, effectuation, assistance, subsequential protection.

2. Multitude of offences naturally concatenated on the occasion of the same forbidden design; acts of preparation, attempt, consummation; as in rebellion, sedition, riot, smuggling.

Examples of cases in which persons more than one may stand connected in interest, on one side or the other; in particular, on the pursuer's side: —

I. Husband and wife.

II. Principal and trustee; to wit, in the various characters of

1. Guardian of a non-adult.

2. Guardian of a person insane.

3. Steward for residence or property.

4. Bailiff for property.

5. Commercial agent.

6. Trustee for a mass of property, placed in trust for some particular purpose.

III. Persons respectively claiming, or possessing an official situation, non-ecclesiastical or ecclesiastical, in the characters of locator (patron,) locatee (nominee,) incumbent, or other occupant.

IV. Executor or executors, or administrator or administrators to a party deceased.

V. Partners in a mass of manufacturing or trading stock, or in the exercise of a profit-seeking art or profession.

VI. Members of the same corporate body, suing or sued as such.

VII. Persons jointly interested, as co-occupants or expectants, simultaneously or successively, in a mass of immoveable property co-devisees, remainder men, & c.)

VIII. Persons having an interest in a complex subject-matter.

IX. Possessor of a thing claimed by divers claimants; as in case of interpleader, garnishment, foreign attachment (*Anglicè*,) multiplepoinding, arrestment (*Scoticè*.)

Examples of cases in which persons more than one may stand connected in interest on one side or other, in particular, on the defendant's side; — to wit, in non-penal cases —

1. Proprietors or occupants of lands, on which tithes or fee-farm rents are claimed by the same title.

2. Drawer, drawee, and indorsers of a bill of exchange.

3. Principal and sureties, or say bondsmen.

4. Co-freighters in the case of a loss upon a ship's cargo.

5. Co-underwriters in a case of insurance.

Examples of suits more particularly apt to afford a multitude of witnesses, or sources of real or written evidence: —

Suits relative to

1. Boundaries.

2. Rights of common.

3. Rights of way.

4. Tithes.

5. Legitimacy and filiation.

6. Wills — their authenticity or fairness.

7. Deperition, or deterioration of buildings, or navigable vessels, or their contents, on the occasion of insurance.

8. Corporate rights — (rights possessed or claimed by persons as members of a corporate body.)

Examples of multitudinous masses of evidence, most commonly testimonial, each applicable to any sort of suit: —

1. Alibi evidence.

2. Character evidence. (Facts tending to the depression or exaltation of the character of a party or witness).

3. Facts tending to the proof or disproof of a circumstance operating in diminution or augmentation of the probative force of a person's evidence: such as connexion or disconnexion in the way of pecuniary interest, natural relationship, rivality, or any other cause of amity or enmity, as towards a party to the suit.

4. *Facts* alleged as excuses for *non-forthcomingness* on the part of persons or things.

Examples of cases where multitudes of evidentiary facts may be requisite to prove or disprove a habit, or custom, or condition in life: —*

Case of a habit: — facts probative of

1. Insanity (as for the purposes of subjec-

* *Ex. gr.* of husband, wife, or child, of such a one.

tion to guardianship, invalidation of contracts, exemption from punishment.)

2. Cruelty (on the part of a master, father, guardian or husband, for the purpose of separation.)

3. Loose intercourse (on the part of the husband or wife, for extenuation in adultery.)

4. Case of a custom, to wit, a habit on the part of a multitude of persons.

5. Customary occupation of land, for the purpose of passage, pasture, or exfodiation, or abstraction of water.

Examples of cases where the subject-matter of demand; that is to say, of the service demanded, is complex: —

I. Case where the whole is demanded.

1. Mass of moveable property, due on a bill of sale.

2. Lands or buildings in the possession of divers occupants.

3. Estate yielding successive masses of income, in one or more of a variety of shapes; such as tithes, fee-farm rents, manorial quit-rents, fines or heriots, tolls, fees of office, &c.

II. Where a share only is demanded.

1. Share in a mass of property vacant by death.

2. Share in a mass of property possessed in common, on the footing of partnership.

3. Share in a mass of property subjected to division on the ground of insolvency or bankruptcy.

4. Share of a mass of property captured in war, generally by sea.

§ 5. *Original and excretitious.*

An *excretitious* suit is a suit which has grown out of a former one, called thence, the *original.*

Sources of excretitious suits: —

1. Obstruction; viz. to the course of justice.

2. Retaliation (judicial;) viz. by counter-demands.

Sources of obstruction: —

1. Original circumstances of parties at commencement.

2. Incidental or adventitious; springing out in the course of the suit.

Original sources: — examples are —

1. Applicant's relative indigence, thence inability of himself to pursue.

2. Applicant's deficiency in respect of natural responsibility. [As to natural responsibility, see Constitutional Code.]

Incidental or adventitious sources of obstruction: —

Examples are —

Non-compliance, viz. with reference to judge's decree, on the part of

1. Parties.

2. Extraneous witnesses.

3. Judicial functionaries.

4. Persons at large, incidentally called upon for judicial services on the occasion of the suit.

Practical use of the mention made of obstructions: —

Rule 1. From obstructions in any number, and need of correspondent excretitious suits in consequence, make not a ground for delaying longer than necessary the termination of the original suit.

Rule 2. Where, for the purpose of the original suit, evidence has been adduced sufficient to warrant conviction of delinquency in respect of an obstruction, proceed to judgment and execution accordingly; making up the record of the excretitious without waiting for the termination of the original suit.

Exemplification of the use of these rules, as applied to testimonial falsehood uttered in the course of the suit: — in one and the same suit, by the same or any other person or persons, testimonial falsehoods may in any number have been uttered, when the grounds for withholding credence have been sufficient for conviction of falsehood, and no further ground or grounds for defence could be obtainable by any separate suit.

In the English system, for want of such rules, falsehoods by thousands remain unpunished, and in a vast proportion give to the criminal the profit sought by his crime: in case of a separate prosecution, the expense, delay, and vexation, being vast and certain; adequate motives wanting; and conviction, judgment, and execution, eminently uncertain.

Practical use of the mention made of judicial retaliation: —

Rule 1. If, from the applicant's examination, it appears that the proposed defendant has a counter-demand against him, impose not the burthen of defence, unless, if applicant's statement be correct, service in some shape is due to him on the balance.

Rule 2. For this purpose, make this a constant part of the applicant's examination.

Rule 3. On the first mutual attendance, take cognizance of all subjects of disagreement, and decide accordingly, doing what can be done towards re-establishing amity of affection, and producing on both sides a sentiment of approbation in relation to the decrees, if any, issued in conclusion.

§ 6. *Plurilateral and unilateral.*

Ordinarily, sides in a suit two — pursuer's and defendant's: in each situation, individuals in any number: suit plurilateral, viz. bilateral.

Necessary to constitute a suit, — situations two; whereof the judge's, one; the other, either defendant's or pursuer's: suit in both cases unilateral.

Case where defendant's side only has place: pursuer's being wanting, judge occupies it. Examples: —

1. Suit penal, procedure styled *Romanicè, inquisitorial;* in contradistinction to *accusatorial*, the more ordinary mode.

Initiator here, the judge: to the judicial, he adds the pursuer's function. Information he needs none. On suspicion (seat, and perhaps source, confined within his own breast,) he convenes, or causes to be prehended, the object: and by interrogation, extracts evidence, direct or circumstantial, or both; — direct, from responsion; circumstantial, from responsion or silence, and deportment.

If judge acts from information, the more apt course would be, to consign the pursuer's function to the government advocate.

2. Suit non-penal, — audit of accounts. Judge styled auditor. Case in which it is most in use, that where an individual, having received money from or for government, has to prove the aptitude of the use made of it.

Case where pursuer's side only has place: defendant's wanting, judge occupies it.

Example: — Court of claims, *Anglicè:* benefit claimed, privilege of acting a part in a state ceremony — the coronation.

Preferable course, consigning the defendant's function to the government advocate.

Thus, *Anglicè*, on a claim of peerage: so here on claim of a place in the Merit Register, as per Constitutional Code.

In both cases a suit has place: for so have contestation, and judicial decrees thereupon; else, the decision would be avowedly arbitrary, which it is not in either case.

In both, the judge, how unaptly soever, adds to his own function, those of the party or parties on one side: thus are both sides occupied.

Difference between number of sides, and number of conflicting interests. If for every one of a number of antagonizing interests supported in the course of a suit there were a side, the number of sides would be indefinite.

Examples are, — all cases where a mass of property is to be divided among co-claimants; where the subject-matter is complex.

Example of causes of opposition of interests here, are, —

1. Question, who shall be admitted, who not.

2. Of those admitted, what shall be the respective shares.

Here, if the supposition be that there is but one suit, if there be as many sides as interests, there are as many sides as claimants: or the suit may be resolved into as many elementary suits: in each of which there may be one pursuer, and the rest all defendants.

Illustration, on the supposition of four co-claimants. Suits and claimants, suppose four, A, B, C, and D: —

Suit 1. Claimant and pursuer A, the joint contestants and defendants B, C, D.

Suit 2. Claimant B, joint contestants A, C, and D.

Suit 3. Claimant C, joint contestants A, B, D.

Suit 4. Claimant D, joint contestants A, B, C.

Cause of the habit of considering a suit as having but two sides, whatever be the number of antagonizing interests. The design of the suit originating in some one party interested, his endeavours have naturally been, to engage all those to join with him (whose claims he regarded as uncontestable,) were it only that they might share with him in the expense. All who did not join with him were of course made defendants, that by the judge they might be compelled to submit to him the making the division, or say distribution.

Thus come to view identity, and diversity, as to suits.

Every separate demand may be considered as constituting a suit.

This admitted, in every course of action ordinarily considered as constituting the suit, may be distinguished as many elementary suits as there have been made demands in the course of it.

Examples: —

1. All excretitious suits that have grown out of the original.

2. All counter-demands made on the defendant's side.

3. The demand, in consequence of which a quasi-jury inquiry is instituted.

4. The demand, in compliance with which appeal is allowed.

5. Any demand by which, after being instituted in one judicatory, a suit is for any purpose brought before another; for example, for effecting forthcomingness of evidence or execution.

6. Each such suit may be considered as resolved into as many suits as there are pursuers in it.

7. So, as to defendants.

8. The identity of a suit may be considered as destroyed either by the accession or the secession of a party on either side.

Use of the divisions of suits into plurilateral and unilateral, that the apparently unilateral being seen to be suits proper for the cognizance of a judge, the judge in these cases may be subjected to the same *checks* as in other cases.

Use of the exposition in regard to identity and diversity — that upon no assumption in regard to identity or diversity, any pretence be built for an arrrangement not conducive tc the ends of justice.

In particular, for causing operations or instruments to be repeated, under the notion of the extinction of the suit — for example, by death of a party. Examples are various

in English procedure: occasions and pretences various — ends and motives the same.

Particular use in regard to succeeding stages of inquiry, recapitulatory and appellate: —

1. In the recapitulatory inquiry, all the excretitious suits that can have influenced the decision in the original suit, should be brought to view — none that have not.

2. So, on the appellate inquiry.

But as by the manifold-writing system, the record containing the whole proceedings will be brought to view in both stages, without fresh expense, the distinction will apply not to exhibition, but to observation — to the notice that may come to be taken in the course of argumentation.

Question — Inquisitorial procedure, why not here admitted?

Answer — Reasons: —

1. With a view to appropriate *intellectual* and *active* aptitude: it is of use, that as the undivided attention of one person is employed on the one side, so should that of another person on the other side: the judge's attention being equally applied to each, for the purpose of decreeing in favour of that side which has presented the strongest arguments.

2. With a view to appropriate *moral* aptitude: that in these extraordinary cases the judge may be acting under the same checks, as in all ordinary ones.

§ 7. *Services graduable or non-graduable.*

The service demanded by the demand-paper may be either graduable or ungraduable. Understand by a graduable service, a service which admits of degrees: as, for instance, a service which consists in the demand of a sum of money, in compensation for a wrong suffered in a shape other than pecuniary. Whatsoever be the number of sums of money of the lowest denomination, capable of being taken for the subject-matter of payment on the score of compensation, that same is the number of degrees of which the amount of the compensation is susceptible.

Understand by a non-graduable service, a service, in respect of which no alternative has place, but that of complete performance and complete non-performance: as, for instance, the restitution or transference of a thing not susceptible of division, without destruction or deterioration of value, as a horse, or a house. The service consisting in the payment of a sum certain, in pursuance of a contract: for instance, a bill of exchange drawn on the defendant, and by him *accepted*.*

When the service demanded by the demand-papers, at the charge of a defendant, is graduable, the pursuer will individualize the degree which is the subject-matter of his demand; that is to say, in case of compensation-money for a wrong the precise sum which he consents to accept.

After examining him as to the grounds or reasons on which the fixation thus made of the sum is grounded, the judge will either attach his provisional assent to that fixation, or make such other fixation as to him shall seem meet; which done, the sum so provisionally fixed upon will be the sum stated in his compliance or defence-requiring mandate, as the sum which will be exacted of the defendant, in case of non-compliance, coupled with non-response.

Generally speaking, if the judge sees reason for substituting a fixation of his own to the fixation made by the pursuer, the sum fixed upon by the judge will be less than the sum fixed upon by the pursuer; and in the ordinary state of things, such lesser sum will, by reason of the self-preference inherent in human nature, be the sum fixed upon by the judge. But what may happen is, that in addition to the grounds for increase which have presented themselves to the views of the party, others may have presented themselves to the more experienced eye of the judge; in so far as this is the case, he will present them to the view of the pursuer, giving him at the same time the liberty of substituting the increased sum thence resulting, to the sum originally fixed upon as the sum demanded.

§ 8. *Suits expeditable and continuous: continuous, essentially continuous, and accidentally continuous.*

By expeditable, understand capable of being terminated, so far as depends upon the issuing of the ultimate decree, and consequent imperative execution-ordering mandate, terminated on the day next to that of the admission of an applicant, in the character of pursuer, or say *demandant*.

All factitious delay being injustice while it lasts, all suits are, under the greatest happiness-principle *presumed* to be expeditable in the above sense; that is to say, that in every instance for the justification of the correspondent delay — of the delay occasioned by their being not expedited, some special reason will require to be given.

By a continuous suit, understand every suit which is *not* as above expeditable, and expedited; or say *non-expeditable* suit.

A suit to which it happens to have been a non-expedited suit, has been rendered so either by its own nature, or by accidental circumstances, with which a suit of any sort naturally expeditable, is not so liable to be attended.

* The expression is ambiguous: preferable appellation, *sanctioned* or *confirmed*. Acceptance presents, in the character of acceptor, not the individual *drawn upon*, but the individual by whom the promise is accepted as an equivalent for performance, by payment.

Every suit which is complex is, according to the degree of its complexity, capable of being continuous in its own nature. For the modes of complexity, see *Scotch Reform*, Delay and Complication Tables, Vol. V.

When, for the purpose of the suit, money or money's worth requires to be either collected or distributed, or both collected and distributed — collected from various persons — distributed among various persons, — such suit cannot fail to be in a greater or less degree continuous.

Every such collection and distribution suit supposes *a trust*, created for the purpose: a person constituted a trustee for the purpose of transferring the subject-matter of the suit to an intended benefitee, or aggregate of intended benefitees.

The original trustee will in this, as in all cases, be the legislature: but for the purpose of the fulfilment of the trust, giving effect to the benefit intended by the creation of the trust, the legislature may either locate, or endeavour to locate the trustee, by its own immediate and single authority, or by the intervention of some person or persons appointed by it for the purpose. This person or persons are either a person or persons at large, or the judge: when it is the judge, application must of necessity be made to him for that purpose. Call it a trust-demanding, or trusteeship-demanding application.

Of trusts created, and accordingly trustees located, or say constituted, examples are the following: —

1. In contemplation of insolvency, a person in whose apprehension the amount of his assets (including money in hand, and credits or any debts due to him) fails of being equal to the amount of his debts — that is to say, the money due from him — locates the aggregate of his assets in the hands of a trustee or trustees, to the intent, that after, or during the reduction of the whole to the shape of an aggregate sum of money, distribution of such aggregate sum of money may be made among his creditors, each receiving the same proportion of the debt due to him.

Here may be seen in this case — 1. Trustor, the apprehended insolvent; 2. Trustee or trustees, the person into whose possession the money in hand, and the power of collecting the money not in hand, is transferred; 3. Intended benefitees, the creditors. Use of this disposition, putting it out of the power of the apprehended insolvent to transfer to any creditor more or less than that which is regarded as his proportionate and due share as above.

2. Of the proprietor of a mixed stock of property, the decease takes place: to some person or persons, one or more, the greatest happiness-principle manifestly requires that transfer shall be made of it. If (in virtue of an appropriate disposition of the law) by the deceased himself, appointment of this or these post-obituary successor or successors has been made in a will, he or they are in that case, in the language of English law, termed *executor or executors*. In default of such appointment of an executor, the law has, by enactments of its own, appointed the trustee or trustees for this purpose: say in that same language, an *administrator* or *administrators*.

But should the law be so worded, or the parties in question so circumstanced, that persons more than one, to the exclusion of others, demand to be received as administrator or administrators, or no person is willing to act in that capacity, and for that purpose to take upon himself the burthen of the trust, — in that case it will rest with the judge to make the appointment; and the question, who shall be the trustee or trustees so appointed, will be the subject-matter of the suit.

Note, that in case no person should be desirous, and thence no person applying, the nature of the case requires that on some person or persons, the obligation of taking upon himself, and giving execution to the power in question, must be imposed; for what is continually happening is, that among the persons by whom the vacant mass of property may come to be shared, are those who are neither fit nor able to give execution to such powers of themselves.

§ 9. *Distributive-seeking suits.*

Suits at large, and *distributive*-demanding, or say, distributive-*seeking suits*: into these two sections may the aggregate, composed of non-inculpative suits, be divided.

By a distributive-seeking suit, understand a suit, in and by which the benefit sought to be obtained is an aliquot part of a mass of property of whatsoever kind; that is to say, whether it be a portion of the subject-matter or subject-matters themselves, or say the *effects*, as in common usage; or a portion of the value of them as determined by sale.

In every such case, for the giving effect to the suit, two decrees will be requisite: one by which commencement is given to the aggregate operation of distribution: the other, by which termination is given to the aggregate operation demanded; that is to say, the distribution of the effects.

Exceptions excepted, of the aggregate which is the subject-matter of the distribution, the composition may be infinitely diversified. For the different modifications, of which the subject-matter of property, that is to say, of proprietary rights and powers is susceptible, see Non-penal Code, Proprietary Rights, their modifications.

Occurrences by which, on the part of the

proprietor, the need of demand for distribution is, or is capable of being produced, are the following: —

1. Death of the proprietor.
2. Insanity—relative insanity—on the part of the proprietor.
3. Latentcy of the proprietor.
4. Insolvency at large, on the part of the proprietor.
5. Insolvency on the part of the proprietor in the case in which it is termed bankruptcy.

In the case of the death of the proprietor, the title of the demand for the distribution may have either of two efficient causes: —

1. Testamentary disposition made by the deceased, with the concurrence of the legislature.
2. Disposition made by the legislature, in so far as such disposition has failed of having been made by the deceased.

In each of these several cases, two distinguishable services, the one succeeding the other, are demanded at the hands of the judge: the one the initiative, the other the consummative.

Of the initiative service, performance is made by conferring on some person or persons, in so far as is requisite for the purpose, right and powers the same as were possessed by the proprietor in question at the moment of the happening of the occurrence. The purpose of this transfer being the conferring of the benefit in question on some person or persons other than him or them into whose possession the subject-matter in question is to be made to pass, — the consequence is, that such person or persons are, in respect of the obligation conferred on him or them, a trustee or trustees. A trust is created, in respect of which the legislature is trustor or trust founder: such new possessor or possessors, trustee or trustees: all persons by whom it is intended that aliquot parts of the aggregate subject-matter of distribution shall be received, are intended benefitees.

This case is of the number of those in which the interessees, other than parties, are capable of having place, and on either side, or on both sides of the suit.

This species of suit is of the number of those which may be styled complex: sources of complexity essential to the case are the following: —

1. The subject-matter of the property in question, and thence of the suit.
2. Interessees.
3. Parties admitted on the pursuer's side.
4. Parties admitted on the defendant's side.

§ 10. *Several Suits against the same person, how combinable.*

Whatsoever be the number of demands which a pursuer has against a defendant, if there be but one pursuer and one defendant, they may be carried on together; and so they ought to be, if either in respect of the direct, or in respect of the collateral ends of justice, any preponderate advantage be by such conjunction gained.

In the hitherto current practice, such conjunction has everywhere had place in sundry cases; to wit, in every instance in which demands in any number are customarily included under one and the same name.

Such complexity may have place on one side only, or on both sides: on the part of the pursuer only, or on the part of the pursuer and that of the defendant likewise.

Advantages from this conjunction, when it takes place on the pursuer's side alone, are as follows.

I. Advantage to the pursuer: —

He may obtain at once the security sufficient for the eventual obtainment of satisfaction in respect of all of them: whereas, if admitted to adduce them no otherwise than successively, the result might be, that after obtaining adequate security in respect of the first, security in respect of all the rest might vanish and be lost.

II. Advantage to the defendant: —

1. By his learning and viewing at once the whole extent of his responsibility, his mind might, in so far, to wit, as against all demands from that individual, be comparatively at ease: he would see in its whole extent, the burthen capable of being imposed on him — the burthen, for his exoneration from which he would have to provide.

2. In case of cross demands, the defendant would have no more to do than to pay or perform the difference, instead of paying or performing the whole in the first instance: with respect to which he might perhaps be unable; and if able, subject to the accident of not being able to obtain the effect of his demand against the pursuer.

III. Advantage mutual to both parties: —

The same attendance, thence the same journey from home to the judicatory, might serve; and would serve for any number of demands and cross demands.

IV. Advantage to third persons: —

In the same manner as in the attendance of the parties, a single attendance on the part of witnesses, might serve, instead of two or more attendances. So in the situation of missionary judicial functionary, a single act of accersition or prehension, personal or real, instead of two or more.

But be the number of distinguishable demands thus conjoinable with advantage ever so small, or ever so great, they should not the less be kept distinct, and characterized each by its generic and specific name, with indication added of the evidences from which they respectively receive their support.

Advantages from the distinctness of description are as follows: —

1. On the part of all persons concerned—to wit, parties, assistants, judge, and registrar — clearness in the conception entertained of the several demands, with their grounds in respect of law and fact, would thus be maximized.

2. In regard to probation, whatsoever order turned out, upon inquiry, to be best adapted to the ends of justice, direct and collateral, might, and naturally would be, given to the several masses of evidence, and in case of need, to the several masses of argumentation.

3. In divers cases, the grounds of demand in point of law capable of applying to the same fact, are so nearly contiguous as to be difficultly distinguishable, especially by a pursuer, antecedently to judical examination. For these cases, provision has been made in Ch. XII. § 5, *Pursuer's Initiatory Application Demand how amendable:* according to the evidence, for placing the demand, and consequent execution, upon a different footing from that originally alleged.

By the here proposed unlimited conjunction of demands, facility may, on various occasions, be given to such *law-allegation-amendments.*

§ 11. *Common-law and equity suits, — imaginary, their distinction.*

To every one who will suffer himself to think, and who in thinking will consider the system of procedure as a means to an end, and that end the giving execution and effect to the substantive branch of the law to which it is an appendage, it will be sufficiently evident that the distinction between common law and equity is purely arbitrary and imaginary. Common-law procedure, in so far as it is anything better than a system of depredation and oppression, has for its several ends the giving execution and effect to the substantive branch of the law: of equity, if it be anything better than a system of depredation and oppression, the same may be said. Common-law procedure has for its subordinate object the elicitation of the facts which, if proved, the pursuer relies on, as constituting his right or title to the service demanded by him at the hands of the judge, as promised to him by the article of law, which the demand takes for its ground.

Equally true is this, when predicated of equity instead of common law.

This distinction, then, has nothing in it that is natural, nothing that belongs in common to man at large, or so much as to civilized men anywhere: what it is the result of, is altogether peculiar to British soil, and British practice. Originally it was a conflict, latterly a compromise, between two contending powers—the one called spiritual, in contradistinction to the other called temporal — the former having for its sanction that which bears the name of the religious.

So much for the origin. As to the effect, the broad line of distinction is that between what is transient and what is continuous; a distinction in the political nosology, analogous to that between acute and chronical in the natural nosology.

In a case of which the common-law judicatories take cognizance, there is but one demand either altogether simple, or in but a comparatively slight degree complex; in a case where the judicatories called equity courts take cognizance, the subject-matter of demand is to an indefinite degree complex: the common-law mode of procedure did not in its origin comprise, and does not at this time comprise power adequate to the affording satisfaction to the demand.

A case of account may serve for example.

§ 12. *Account suits*

By an account suit, understand any suit on the occasion and in the course of which cognizance is taken of demands more than one, on both sides or on either side, originating respectively from efficient causes of right or titles, more than one.

Whatever be the cause or causes of it, it is desirable that to all suffering on both sides, or on either side, from whatsoever cause originating, a termination should be put as soon as possible. *Interest reipublicæ* (says the Roman maxim) *ut sit finis litum:* still more strongly and manifestly is it the interest of the individuals concerned.

Accordingly, on what occasion soever a party on each side is come into the presence of the judge, before their departure he will take the requisite course for ascertaining whether between them any, and if any, what causes of disagreement have place: any cause or causes of complaint on either side at the charge of the other: complaint of any such wrong, for which it is in the power of the judicial authority to apply a remedy.

§ 13. *Suits summary and chronical..*

By a summary suit, understand a suit dispatched at the end of the smallest length of time: by a chronical suit, a suit dispatched at the end of any greater length of time.

Considered as descriptive of the sort of suit, the only difference between a summary and a chronical suit is — that whereas a summary suit may be dispatched at the end of the smallest length, a chronical suit cannot be dispatched till at the end of a greater length of time.

A suit of any sort may last for any the greatest length of time; the absence of a necessary witness, or piece of real or written evidence, suffices to produce this effect.

Generally speaking, a suit will be likely to be the more lengthy the more complex it is. But some modes of complexity may be apt to produce greater lengthiness than others.

The case in which the length of the suit is at its minimum, is when on the initiatory application it is dismissed.

Of a suit which is not terminated by dismissal at the end of the initiatory application, the least duration is that which commences with the commencement of the initiatory application, and terminates with the termination of the first mutual meeting.

Where the pursuer is permitted, and the defendant required to attend in person, by far the greatest number of suits are actually thus summary.

Such, then, ought to be considered as the standard duration: in such sort, that for any greater duration some special cause should be looked for, and required to be assigned.

When the parties are both or either of them in the judge's chamber, in presence of each other, of the judge and of the auditors, every such case is provisionally presumed to be a summary case: if adjournment be made of it to another ordinary sitting, or an appointed sitting, it must be because at such first sitting the evidence is not in such a state, that upon the ground of it an apt decision can be pronounced.

§ 14. *Quasi suits, or say incompletely organized suits.*

Of the actors capable of being employed with advantage in the judicial drama, a list has been given in the Constitutional Code.

Without the idea of those characters at the least, the idea of a judicial drama, in any of its ordinary forms, cannot be so much as conceived. These are, —

1. A person by whom the demand is made: call him a pursuer.

2. A person at whose charge the demand is made: call him a proposed defendant.*

3. The person to whom the demand is addressed, and at whose hands the service necessary for the accomplishment of it is demanded: call him the judge.

The idea of a completely composed, or constituted suit, being thus established, a description is now capable of being given of two species of incompletely constituted suits: —

I. Incompletely constituted suit the first: — Parties, — judge and proposed defendant. Wanting, or as grammarians say, *caret*, a distinct pursuer. In the person of the judge, the functions of judge and pursuer are united.

Exemplifications of this sort of things are—

1. In English practice — on the adjustment of accounts in non-penal cases — an audit court. Defendant the accountant. Here no demand is made, but the accountant being confessedly a debtor, he is called upon to exhibit evidence, the effect of which, if credited, will be in each instance to exonerate him from the obligation of paying the money in question in the character of a debtor.

2. In German practice, in a certain class of penal cases, there is an entire branch of procedure distinguished by the appellation of inquisitional or inquisitorial: defendant, or proposed defendant, in this case the *inquisitor:* such is the appellation by which he is distinguished. In the opposite case, *accusatorial* is the name given to the mode of procedure.

3. In Spain, this species of judicatory, if at all employed, has been seldom heard of, but as applied to that branch of penal suits which applies to offences affecting religion.

II. Incompletely constituted suit the second: Parties, 1. A pursuer; 2. The judge; *caret* the defendant. By the judge, in conjunction with his own, this part is also acted.

Exemplification is, —

In English practice, the species of judicature called a *court of claims.*

* By giving to a person, at whose charge a demand is made, the appellation of defendant, much confusion is produced: much confusion, and moreover, much oppression and injustice. Can it be otherwise, when a person, who is utterly unable to defend himself, is spoken of, and accordingly dealt with, as if he were actually defending himself?

CHAPTER XV.

SUITS, CONTINUANCE OF.

THE original applicant having been admitted, and this same applicant, or (in the case where he is but an informant) another individual, or (in conjunction with him, or in his stead) the government advocate, being admitted pursuer; and the pursuers, if more than one, and the defendants, if more than one, ascertained and noted down as such: the portion of law of which the legal part of the assumed cause of right is constituted being also ascertained, to wit, by the demand-paper, in which the pursuers (if more than one) will have joined: all the remaining operations (the incidental excepted) which are capable of having place during the continuance of the suit, (or say, all the operations that are capable of having place between those performed at the commencement as above, and the issuing of the decree by which execution or dismissal has place) — are composed of probation, with or without counter-probation, exhibition of appropriate evidence on the pursuer's side, with or without exhibition of appropriate evidence on the defendant's side

Of the diversification which the matter of which the proof is capable of being composed

— or say, of the matter of proof or probative matter — is susceptible, exhibition has been made under the head of Evidence. Susceptible of the same diversification is the genus of persons distinguished by the appellation of evidence-holders: one sort of evidence-holder being of the sort at whose command is evidence of the sort in question: the evidence-holder of another sort, he at whose command is evidence of another of those same sorts.

Things being in this state, what shall be the order of proceedings? Answer: That which is prescribed by the delay-minimizing principle and the corresponding rules. Elicit every article of evidence as soon as may be. Exceptions excepted, inability within the time in question to obtain one piece of evidence, affords no reason for omitting, for any length of time, to obtain any other piece of evidence, much less for omitting the second piece of evidence, till the expiration of the whole length of time which must elapse before the first piece of evidence can have been obtained.

Exceptions will be the following, on the supposition that the matter of fact has in each case respectively been rendered preponderately probable: —

1. Result of the acceleration, misdecision.

2. Result of the acceleration, to a preponderant amount, addition to the expense.

Neither of these cases presents itself as of a nature to be frequently, if at all, exemplified.

A case in which the production of misdecision might be probabilized, is that where, if an antecedently exhibited piece of evidence were made known to the person at whose hands a subsequent piece of evidence is required, it might have produced the effect of sinister, that is to say, mendacity-assisting information, or say instruction. But from the observation of this danger, the practical conclusion and correspondent rule is — when the evidence in question has been elicited, keep it during the requisite length of time undivulged; not abstain from eliciting it.

But for whatever reason, in regard to evidence, exceptions excepted as above, it is right that in no instance, of any piece of evidence, should the elicitation be purposely delayed, so is it, and for the same reason, that no factitious delay should be interposed between the ascertainment of the person or persons, if any, who are concerned in point of interest to be admitted as co-pursuers: or the person or persons who, on the account of the pursuer or pursuers, or on their own account respectively, are concerned in point of interest, in being constituted co-defendants.

Before an applicant, whether proposed pursuer or informant, is dismissed from the justice-chamber, — in relation to every person, if any, of whom by such applicant, indication has been given of his being likely to be able to afford evidence likely to be relevant and material to the subject-matter of the application, in such sort as to be fit to enter into the grounds of the judge's decrees, opinative and imperative, in consequence of, and correspondent to, such application; — it will be for the care of the judge, by means of an appropriate mandate, to elicit from such applicant, indication in so far as he is able to afford it, respecting the trustworthiness of such evidence as may be obtainable from that source, and the means of obtainment in relation to such evidence.

Name of the mandate issued for this purpose, a supposed and proposed evidence-holder's description-requiring mandate.

Heads, under every one of which, matter of the indication, or say information, sought for by such mandate, will require to be inserted, or ignorance declared, are the following: —

1. Name: surname and Christian name, or the equivalent, included.
2. Condition in respect of occupation.
3. Condition in respect of marriage.
4. Condition in respect of abode.
5. Matter of fact, in relation to which he is expected to be able to furnish evidence.
6. Nature of the evidence which he is expected to be able to furnish.
7. Condition in respect of sex.
8. Condition in respect of age.

In relation to these several topics, by himself, or with the assistance of the registrar, the judge will elicit the appropriate information by *vivâ voce* interrogation; the registrar making minutation and recordation accordingly, until the matter of the mandate has been completed; and in relation to such matter, the applicant will be required, by his signature, in relation to such heads separately, or in relation to the whole collectively, to make known his assent or dissent. In case of his dissent to the matter of the entry made in relation to such head, the process of elicitation will be continued till some proposition be elicited from him, to which his signature, in token of assent, has been attached.

In so far as ascertained, according to the relation they respectively bear to the suit, and their respective local situation, issue to them, or for them, the mandates following: —

I. To an expected pursuer or co-pursuer —

Pursuership or co-pursuership acceptance, or refusal-requiring, mandate.

In this case, in conjunction with the mandate, the registrar will transmit an exemplar of the original pursuer's demand-paper, with directions, or say instructions, indicative of the mode of expressing such acceptance or refusal, as the case may be: together with order for the retransmission of it when filled up, and

the means of securing communication with him thenceforward: and information as to the consequences in each case, with reference to his interest.

Appropriate formulary:

Addressee, the party him or herself, as contradistinguishable from a guardian.

1. Name of the suit.

2. Pursuer's personal description.

3. This is to require you either to consent to the becoming, from the day of your receiving this, co-pursuer with (naming him or them,) or to decline the being so.

4. If on or before the [ ] day of the month of [ ] next ensuing, this same paper marked A, with your acceptance thereon signified, be not received at this office, you will, accidents excepted, be deemed to have declined to take upon you the character of co-pursuer in the suit. In the benefits attached to it, you will have no part. In the burthen liable to be attached to it, you will have no part.

5. In case of acceptance, you will retransmit to this office, after filling it up according to the instructions therein given, the communication-securing paper marked B.

II. To a proposed defendant or co-defendant —

Compliance or defence-requiring mandate.

Of the mandate thus denominated, the matter will be different, according as the suit is of the non-inculpative or the inculpative class.

In this case also an exemplar of the original pursuer's demand-paper will be transmitted, with appropriate directions, or say instructions, and information as to the consequence to him in point of appropriate interest.

Also with directions as to the mode of compliance-rendering, compliance-promising, or compliance-refusing, with grounds of, or any reason for, non-compliance or compliance-refusing, and communication-securing information.

III. To a supposed evidence-holder —

Evidence exhibition-requiring mandate.

As to place and judicatory, this will be — either,

1. A hither-calling, or say accersitive evidence-exhibition-requiring mandate; or,

2. A thither-sending, or say missive evidence-exhibition-requiring mandate; or,

3. A responsive evidence-requiring mandate, coupled with a paper of interrogatories, or any interrogatory paper annexed.

Of this interrogatory paper, the object is to elicit evidence (self-disserving evidence included) from the supposed evidence-holder, whether a party or non-party.

CHAPTER XVI.

SUITS — TERMINATION.

WHEN the suit is other than a distribution-demanding one, the times for the termination of every suit are two: —

1. When all the evidence which on both sides the nature of the individual case in question appears to have furnished, has been elicited; understand, in a form fitted for ultimate use.

2. When of this or that piece of relevant evidence, the existence of which is more or less probable, the obtainment is, in the opinion of the judge, physically or prudentially impracticable.

In the first case, the definitive decree will be absolute.

It will be so in the case of every one of the four species of suits following: —

1. Noninculpative.
2. Inculpative, but not criminative.
3. Criminative, and purely public.
4. Criminative, and publico-private.

Correspondent to the nature of the remedies to be granted, — and thence to the nature of the remedy, the application of which is the subject-matter of the ultimate service demanded by the suit, — will be the operations, the performance of which will be the subject-matter of the mandate by which the decree is expressed. As to these, see Penal Code, Part II. *Remedies collectively.*

In the other case it may, as in the opinion of the judge may seem most meet, be either absolute or conditional.

If absolute, and in favour of the pursuer's side, it will by the imperative part of it, order execution and effect to be given to the correspondent portion of the substantive law.

If absolute, and in favour of the defendant's side, it will, by the imperative branch of it, pronounce dismissal; dismissal, to wit, of the pursuer and his suit, inhibiting him from making any ulterior application to that same judicatory in respect of it.

In this case, provision is made for securing judicatories, and suitors in the character of proposed defendants, from vexation by unduly reiterated pursuit.

The decree being conditional, it may be so in either of two modes: —

1. In favour of the pursuer's side, but reversible simply, or modifiable, in the event of the exhibition of this or that piece of evidence by which the pursuer's right would be established, or the non-exhibition of this or that piece of evidence by which the existence of the alleged right of the pursuer would be disproved.

2. In favour of the defendant's side, but simply reversible, or modifiable, in the event of the exhibition of this or that piece of evi-

dence by which the pursuer's title would be established, or the non-exhibition of this or that piece of evidence by which the existence of the alleged right of the pursuer would be disproved.

In both cases it will rest with the judge to determine, which of any collateral security shall be afforded by the party in favour of whom the conditional and defeasible decree is pronounced: in the event of the condition not being fulfilled, or being disfulfilled, as the case may be.

On this occasion, he will elicit in the way of evidence, and hear in the way of argumentation, what the party demanding such collateral security has to allege in support of such his demand; and what, if anything, the party opposing this demand has to allege in opposition to it.

If the suit be a distribution-demanding one, two decrees, to wit, an initiative and a consummative, have place.

By the initiative decree, the cause of inquiry, or say of examination, preparatory to the distribution, is determined to be entered upon.

By the consummative decree, the inquiry is declared to be terminated; and by the appropriative mandate, the distribution determined upon, as the result of the inquiry stands expressed.

Whenever a suit receives its termination, it is by a pair of decrees, the opinative and the recordative; with or without a third, the compensative: with reference to the two principal decrees, it is adjectitious or supplementary.

The opinative decree is either simple or mixed: simple, when in favour either solely of the pursuer's, or solely of the defendant's side, there being but one party on each side: mixed, if partly in favour of one side, partly in favour of the other; so likewise if there be any distinction made as between party and party on either or both sides.

When, either on the ground of law, or on the ground of fact, the pursuer fails to prove the justice of his demand to the effective service, which at the charge of the defendant he demands at the hands of the judge, through the means of his judicial service, the tenor of the opinative decree is — failure in the question of fact; failure in the question of law; or failure in the question of fact, and failure in the question of law.

Of the correspondent decree — the tenor in this case is, pursuer, your pursuit is dismissed — let it cease.

Tenor of the compensative decree: Pay to the defendant compensation-money [so much]: (if there be expense or vexation to any person in the character of defendant.) For delay of justice by useless occupation of judge's time, pay to the helpless litigants fund [so much.]

Although, by the present supposition, the suit may and does receive, and is accordingly supposed to have received its termination in the course of the same hearing as that in which it was commenced; — in which case, what is done on the defendant's side will have to be entered on the record, as well as what is done on the pursuer's side; — yet on this occasion, for greater distinctness, it may be advisable not to exhibit anything of what will have been required to be done on the defendant's side: reserving that for the case which will manifestly be by much the more ordinary case, namely, that in which nothing is done on the defendant's side, until, in consequence of an appropriate mandate issued by the judge, he has paid his attendance at the judicatory before the judge: the pursuer, exceptions excepted, being present at the time.

Here then will follow the demand-paper, containing the entries that will require to be made on the part of the pursuer, he being the person, and only person, whose discourse it is considered as containing. Any portion of discourse, which in consequence of it may have to be made on the defendant's side, as and for the discourse of a defendant, or a number of co-defendants, will be exhibited at the same time at which, in consequence of an appropriate mandate from the judge, the defendant or defendants in the more accustomed manner, at a subsequent stage of the suit, make their appearance on the scene.

Tenor of the terminative decree in this case: —

I. Opinative decree. The pursuer's demand is well grounded — 1. On the question of law; 2. So on the question of fact.

II. Mandative decree. Of this the tenor will vary according to the species of the case, and thence of the suit.

1. No wrong or quasi-wrong imputed to any defendant. Suit purely requisitive not inculpative; partition requisition.

Appropriate mandate: — Partition shall be begun, and under my direction made.

Pursuers one or more: defendants one or more: extraneous witnesses, none. Parties fully bound on both sides; judicial service demanded by the pursuer, granted. Opinative decree, pursuer's demand, was adequately grounded on the question of law: so, adequately grounded on the question of fact. Mandative decree, by the issuing of which the judicial service is rendered, and the effective service commanded to be rendered to the defendant, expressible in the following examples: —

2. Cause of suit, say *corporeal vexation*, or the correspondent attempt, preparation, menace, or challenge. Mandative decree: compensation-ordering, — Pay [so much] in compensation.

3. Cause of suit, *non-performance of con-*

tract: contract the most ordinary sort, — work done, goods furnished in expectation of value in money, expected on just and adequate grounds. Decree here again, — Pay [so much] in compensation.

4. *Suit publico-private; cause of suit, theft:* goods found on defendant — defendant immediately prehended and adduced by pursuer, confessing, or in vain denying: other witness none. Opinative decree, under question of fact, the goods taken by the defendant; under the question of law, taken under circumstances which make it theft. Mandative decree, under compensative part, Convict, restore the goods: under punitive part, Convict, submit to the appropriate punishment [naming it:] thereupon correspondent subsidiary punifactive mandate to the appropriate authorities.

By execution given to this punishment, correspondent service is rendered to the public at large, say a *securative* service.

In every one of the four sorts of suit, and in every individual of each sort, will be the option of employing either a mandate addressed to the individual at whose hands compliance is expected and called for; or a prehension mandate, addressed to a prehensor, and requiring prehension to be performed either on a person, or a thing, or on both, as the case may be.

Whether the need of prehension has place, cannot be determined with propriety by the mere consideration of the species of suit; that is to say, as to whether it belongs to one or another of the above-mentioned four species.

1. In the case of an individual suit belonging to the non-inculpative species, it may happen that the employment of this instrument, strong and drastic as it is, may be needful.

2. In the case of an individual suit belonging to the criminative species, whether it be the purely-public or the publico-private species, it may happen that the employment of this instrument of security may be needless: indeed, to by far the greatest part of the extent, it will be so.

CHAPTER XVII.

SUITS, THEIR STAGES.

STAGES of inquiry, three: —

I. Original inquiry.

II. Reiterated, recapitulatory, or quasi-jury inquiry.

III. Appellate inquiry.

These are the same in all cases. On each inquiry sittings and hearings in any number.

I. Original inquiry, its business. Judge, after hearings, pronounces his definitive decrees, opinative and imperative, and gives execution and effect, if there be no reiterated inquiry.

II. Reiterated inquiry, its efficient causes:

1. Judge's spontaneous order.

2. On demand by pursuer.

3. On demand by defendant. Spontaneously he *may* order it; on demand, he *must*.

III. Appellate inquiry, its efficient cause, demand from either side.

1. Ordinary time, after definitive judication and before execution.

2. Extraordinary time, after interlocutory decree and before execution thereof: where, but for appeal, interlocutory might have the effect of definitive. Examples: — 1. Undue delay; 2. Precipitation; 3. Exclusion of evidence.

I. *Original inquiry.* Initiatory application, if contentious, as on the occasion of a suit, commences by a public application to the judge, by some person as pursuer, or pursuer's substitute; exceptions excepted, by pursuer.

If upon applicant's own showing, no probable just cause of demand appearing, the suit is dismissed: vexation thus to none but applicant.

Causes for party's non-attendance: —

1. His attendance is impracticable.

2. Preponderantly inconvenient.

3. Plainly useless or needless.

In case of falsehood, coupled with insincerity or temerity, applicant is responsible, as effectually as an extraneous witness. So every other actor on the judicial theatre.

Also for purposed insincerity or temerity, in respect of vexation to party, witness, judge, or any other actor.

Application if causeless, wanton, or malicious, a fine to helpless litigants, or say *equal-justice fund.*

Applicant may bring all or any witnesses, who may all be counter-interrogated.

Applicant, if, with or without other witnesses, he is unable to speak to a certain fact, but indicates one who could probably speak to it, but whom he could not bring, — judge, before dismission or retention, may convene the alleged probable witness; upon like indication of him, another, and so on, till through one or more such indicant witnesses, a percipient witness is found, whose evidence as such is employable.

In so far as the procedure takes this course, it is *investigatorial.*

Penal, the case in which such investigation is most in demand; but it may be in any case in which the importance will outweigh the vexation.

The first mutual attendance will be the defendant's first attendance. Now may all parties bring all their evidences. Better so than not: for thus may matters be settled.

In this case will be the vast majority of suits. Examples: —

1. Small debts.
2. Trifling assaults.
3. Vituperative oral discourses, with or without others than the parties for witnesses.
4. Small detected thefts.

Be the case ever so complicated, here may generally be settled —

1. The law and facts in issue.
2. In relation to such evidences as have not been adduced, the persons and things to be sought, and their respective places.

By consent of all parties on the other side, on any attendance after the first, the presence of any party or parties may be dispensed with.

II. *Inquiry recapitulatory*, or *quasi-jury inquiry*. The case in which an apt judge will desire it, is where evidences which have been received separately as they could be obtained, require to be confronted. A case in which a party will desire it, is — where to the above use is added that of affording to any error of the judge the corrective applicable by the quasi-jury, with ulterior argumentation on the whole evidence. For the check applied by the quasi-jury, see Ch. XXVI. *Quasi-Jury*.

On this reiterated inquiry, it being recapitulatory, no evidence will be received that could have been produced during the original inquiry: to save time, by consent of parties, the re-exhibition of any lot of evidence may be omitted.

III. *Inquiry appellate*. Its efficient cause on either side, — dissatisfaction with judge's decrees. Sense of exposure to it will be among his checks.

Evidence received here, none but what was received below.

Necessary costs, comparatively inconsiderable: —

1. Sole constant cost, the mere paper of the record.
2. Incidental cost, fees for argumentation by law practitioners.

Matter of the record, — statement of the whole proceedings, evidence included: of this, exemplars from 8 to 12 will have been written at the same time, by the same hand, by an invention in use. Saved thus will be,

1. Time, and expense of skilled labour in revising for correction.
2. Possibility of variances, thence of error.

Record transmitted by post. Expense imposed afterwards on the party in the wrong, if solvent.

Argumentative fees. Case requiring it, and respondent unable, — power to judge below, to defray the expense: to wit,

1. Exacting from appellant, in addition to fees for his own side, the equivalent for those on the other side: or,
2. Ordering money out of the helpless-litigants' fund as above.

Power to judge appellate, to fine for undue appeal coupled with insincerity, temerity, or malice: fine for helpless-litigants' fund.

On any inquiry, sittings and hearings may be in any number as above. Sittings refer to *time* — hearings to *suit*. Divers sittings may each be engrossed by one suit: divers suits may be dispatched in one sitting, each after one hearing.

Under this code, in each judicatory, in every day of the year, are two sittings: one a day, the other a night sitting.

Justice is as needful one day as another: in the dark part as in the light part. A judge can as easily officiate at night, as does a military officer, a watchman, or a man in any other night occupation. A watchman must keep awake: a judge need but be liable to be awakened.

So, out-door sittings as well as in-door. Jurymen on *view* are out-door. More trouble is now produced by the excursion of one judge than by that of twelve jurymen. Not but that *here* the judge carries a public with him; without a public, a judge is a tyrant under the name of a judge: always a tyrant; naturally a corruptionist.

A sitting is either of course, or appointed, or say by appointment: —

1. In course, the judge receives initiative application.
2. By appointment, in consequence of an order for attendance at a particular day and hour, to any person or persons after an initiatory application. Night sittings are never by appointment. Out-door-sittings mode of course.

Exceptions excepted, under this code, in all sittings and all hearings, publicity is maximized. For exceptions see *Const. Code*.

The stages of judicature might be thought here more numerous than expressed: an additional one is, to wit, as often as any part of a suit passes from one judge to another, particularly from a depute to the principal judge. This, however, is frequently matter of necessity in all systems.

Place does not change here as there; nor thence is the vexation of transition imposed on parties and witnesses. In general, where change has place, the original inquiry will be by a depute — the recapitulatory, *i. e.* the quasi-jury do, by the principal. Desirable it is, in proportion to complexity, intricacy, and importance, that by the judge who ultimately decides, all the evidence should have been heard, that the whole may have presented itself to him in the same shape, and that the best.

By the judge who extracted the *viva voce* evidence should the immediate decree, in as far as possible, be pronounced

Under existing system, for avoidance of

responsibility, judges several on the same bench: one of them elicits the evidence, whilst the others only pronounce the decree.

In this arrangement, profit the sole object attended to.

CHAPTER XVIII.

MEANS OF EXECUTION.

§ 1. *Execution, what.*

By execution, understand that series of operations by which, on each individual occasion, execution and effect is given, or endeavoured to be given, to that portion of substantive law on which the demand made by the pursuer grounds itself. It is the series of operations, by the last of which that judicial service is rendered, the performance of which is the object of the demand so made.

What is done by this same operation, is the application of one or more of the remedies which, in case of wrong, the law has provided and ordained to be applied.

The portion of law, execution and effect to which is the object of the demand, is either a portion of law ordaining in what case and manner an *impetrable* right shall, on an application made by the possessor, be converted into a consummate right; or a portion of law by which one or more of the remedies, in consideration of some wrong, of the number of those of which its list of remedial wrongs is composed, is or are ordained to be administered.

By respite, understand respite of execution, in so far as, when, on a certain day and hour execution ought, according to general rules, to be performed, the performance thereof, on account of this or that particular circumstance, is deferred unto some other period or length of time.

§ 2. *Modes of agency applicable to the purpose of execution.*

Dependent of course on the mode of operation employed on the occasion, and for the purpose in question, will be in every case, the execution and effect given or not given to the decree in question.

This will of course depend partly upon the nature and condition of the agents, but in a more particular manner upon the nature and condition of the subject-matters operated upon.

As to the agents operating, they will in every case be either persons or things, or both: in so far as they are things, of course they will be things in the hands of persons.

As to the subject-matters of operation, in so far as they come under the denomination of *persons*, the faculties operated upon — the faculties to which the operation applies itself — will require to be considered and distinguished.

These will be either the physical faculties, in which case the mode of operation will not be different from what it is in the case of things; or the mental, or say the psychological faculties. In this latter case, they will be either the intellectual or the active faculties: and in so far as they are the *active faculties*, no otherwise can they be operated upon, but through the medium of the *sensitive*.

Execution and effect may be given to the decree of a judge, either by positive agency, or negative agency. If by positive agency, either on persons, or on things: if on persons, either the person ultimately intended to be operated upon, or some intermediate person, by agency on the physical faculties, or by agency on the sensitive faculties; — on the sensitive faculties, either for the purpose of inflicting punishment, or for the purpose of producing compliance: if on things, either on things appertaining to the person in question, the party in the suit, or on things belonging to any other persons taken at large.

In English practice, under the name of *outlawry*, this mode of operation is in ordinary use. But in this case it is indiscriminate, applying to all judicial service, and thereby divesting the delinquent of all rights without exception: or at any rate, without any purposed and deliberate exception. It is moreover conjoined with positive agency, — the property of the outlaw being judicially prehensible, and judicially vendible.

Moreover, the evidence on which it is grounded is that sort of evidence, which in its nature cannot but tend to false results; and on which, if justice were the object, no judgment would ever be grounded. In this case, it takes noncompliance as conclusive evidence of delinquency, in the shape of contempt for the authority of the judicatory; whereas it may as easily be, and perhaps as frequently is, the result of inability to exhibit such compliance.

Under the here-proposed code, this negative mode of agency might be employed with any degree of discrimination imaginable: for by *vivâ voce* examination of the person in question, the whole state of his affairs might for this purpose be brought under view. He might be divested of a mass of property in the hands of this or that person, or of property in the hands of this or that other: he might be divested of an as yet unallowed claim upon property in other hands: he might even be divested of his domestic power in relation to this or that child: or supposing the occasion to warrant it, even of conjugal powers or rights; or the faculty of contracting marriage with this or that individual person

of the opposite sex, or on part of the female sex, with this or that individual male.

To give effect to any such negative agency, it would be necessary that in giving execution and effect to a decree of this sort, pronounced by one judicatory, all other judicatories should by pre-established law stand engaged to concur: and that actual information of it, effectual and universal information, accordingly be given. In the current systems, this universality of effect actually has place: but as to the receipt of information necessary to prevent injustice, in this as in most other cases, it is treated by them as a matter of entire indifference.

To the decrees of a judge in relation to any person, execution and effect may be given, either with or without the introduction of a person other than the functionaries of justice.

When without such intervention, it will be by mere physical agency in persons or things, as in case of prehension.

When with such intervention, it is by compliance on the part of some person or persons that the effect is produced.

The person in question may in this case be either the defendant, or any other person at large.

On the part of the defendant or any other given person, compliance may be produced by operation on his will, either immediately or mediately through any number of wills, one after another in a chain, as in the case of investigatory evidence.

Call the *chain of communication* in this case a *volitional* chain: in the case of evidence, an *intellectual* chain.

In the way of hostility, or tyrannical oppression, or avowed hostility, compliance has not unfrequently been known to be produced, or understood to be produced, by influence exercised in this unimmediate mode.

In the way of judicature, it cannot be exercised on intermediate agents taken at large, without operating in the character of mislocated punishment, nor therefore without injustice.

But in the case of delinquents, dealt with as such, no reason appears why it should not be employed, in so far as, in the eventual punishment which it involves, no excess has place.

In so far as execution and effect depend upon power exercised by the judge over things, inexecution may be produced by delay, whether the things in question are or are not in the custody or power of the defendant: for in either case, deterioration, destruction, asportation, or concealment beyond recovery, may have place.

Suppose appropriate and adequate security found, provisional prehension and sequestration may on no ground have place in relation to property in the hands of the person intended to be operated upon, whether in the character of a defendant, a pursuer, or an extraneous witness.

As in the one case the object of the judge will be to exclude irreparable damage, so will it equally be so in the other.

On the occasion of the security exacted as a ground for the employment of the means of eventual execution in question, this will accordingly be borne by him in mind.

In the case of things, the mode of operation is mechanical, plain, and easy; so likewise in the case of persons, in so far as the faculties necessary to be operated upon are no others than those physical ones, in respect of which the case is not distinguishable from the case of things.

When the nature of the case requires that the faculties operated upon should be the active, and to that effect the sensitive, then starts up the great mass of difficulty; — then it is, that on the part of the person in question, whatever be the result requisite to be produced, *compliance*, appropriate *compliance* is necessary: compliance with regard to mandates and injunctions, or, to use the word more agreeable to the ear of power, *obedience*: though, in truth, obedience is but one mode of compliance, and the case requires, that be there ever so many modes, they should every one of them be brought to view.

So far as the active faculty and the compliance which belongs to it are out of the question, *forthcomingness* on the part of the subject-matter operated upon, forthcomingness in the physical sense, conjoint presence on the part of some operator and the subject-matter of the operation, are necessary. In this case, forthcomingness is employed in the literal sense. But when, in so far as mind is the subject-matter operated upon, forthcomingness is not, in the literal corporeal sense, necessary: by an operator stationed in London, operation, and that to the purpose of producing compliance effectual, may be performed upon a mind stationed in Van Dieman's Land.

In so far as by mind in one place, mind in another place, (though it be ever so widely distant a place,) is capable of being operated upon, especially if with effect—with the effect of producing compliance, — forthcomingness in a particular shape may be considered as having place: forthcomingness in this shape, call virtual forthcomingness: in the other and more ordinary shape, physical forthcomingness.

Here then, and for the several above-mentioned purposes of probation, communication, and ultimate and effective execution, come to be considered the several possible modes of effecting it: always with the ever concomitant and corresponding view of effecting it

with the greatest certainty, and, to the purpose of the above-mentioned ultimate end, with the greatest efficiency, and with the least delay, vexation, and expense, to persons associated and interested, whether in the character of parties, witnesses, functionaries, or persons taken at large.

Thereupon call for solution various problems having regard to forthcomingness according to both modes, in relation to which, as above, there was occasion to make the distinction. In the immediately ensuing section, they will find their place.

§ 3. *Of Forthcomingness — to wit, for the purpose of execution.*

By forthcomingness, understand throughout *appropriate* forthcomingness: by appropriate forthcomingness, forthcomingness for the purpose of execution and effect, whether in an *immediate* way, or in either of the preparatory and instrumental ways above mentioned.

Thus have we forthcomingness to any one of the three purposes above mentioned: probation, communication, and immediate and ultimate execution. In so far as concurrence on the part of the will of him on whom the operation requires to be performed, is not necessary, forthcomingness, in the physical and literal sense; — in so far as such concurrence is necessary, forthcomingness in the above-mentioned *virtual* sense; — and in this sense, in so far as the operation by which the virtual forthcomingness is produced is effective, *compliance* is produced and has place.

To be appropriate and effective, forthcomingness, whatsoever be the purpose of it — whatsoever be the subject-matter of it, must be so, not only in respect of place, but moreover in respect of time.

Hence, in the case of forthcomingness for the purpose of eventual execution, comes the danger of irreparable damage, and with it, a great difficulty: especially as, in this case, what is liable to happen is, that the damage may have been produced in a case in which it was not needed: for that, when the time for immediate execution came, the necessary and requisite forthcomingness would not have been wanting.

Such is, by the supposition, the case, as often as a solvent man who would all along have continued so, is subjected to arrest on the score of debt.

Only in this case, where *eventual* execution comes to be provided for, does the danger of irreparable damage present itself under any particularly formidable aspect: in the case where *actual* execution comes to have place, no danger need be produced beyond that which was intended.

On the subject of forthcomingness, the following are the topics which present a demand for consideration: —

1. To what particular and specific purposes, on the part of what objects or persons in the character of subject-matters and in what modes, may forthcomingness, physical and virtual, to the general purpose of eventual execution, be necessary.

2. In what shapes or modes non-forthcomingness is, on those several occasions, capable of having place. Of inquiry under this head, the use is that which follows under the next head.

3. In which of those several modes forthcomingness, for the general purposes of execution, is by provision of law capable of being made to have place, and fit to be made to have place.

4. In what manner damage, liable to be produced by the operation of the arrangements having for their object the securing of forthcomingness, and in certain cases, through forthcomingness of compliance, may on the several occasions, on the part of the several classes of persons concerned, be minimized.

This leads to the consideration of the species of damage which in the nature of the case is liable to be irreparable: the shapes in which damage for want of service, or by reason of wrong, must be irreparable. This will depend upon the nature of the subject-matters.

As to descriptions of persons: — 1. First come persons at large, in the character of eventual victims of bodily injury, in its several possible shapes. Of these shapes a general idea has already been given: *purpose*, preserving or rescuing from injury, the person in whose instance the provision for forthcomingness is made, to have place. *Mode* of forthcomingness, — locatedness in some situation in which the thus protected person may be in a state of security against the evil apprehended.

2. Next come persons appearing in the character of applicants. *Purposes* preserving from unjust vexation and expense, persons at whose charge, in the character of defendants or otherwise, the application is made: persons at whose charge the service called for by the application, will, if rendered, be granted and performed. Mode of forthcomingness—of all modes by which sufficient security may be afforded to eventual defendants, and witnesses against vexation, unnecessary and thence unjust, either *in toto* or in degree — of all those several modes, whichsoever shall upon inquiry be regarded as promising to be to the applicant in question least vexatious.

3. Next come cointeressees of the applicant, who, though conjoined with him in respect of interest, have not accompanied him in his application to the seat of judicature. Purposes: — 1. Joining with him in affording, as above, security to defendants and forced witnesses, against injustice. 2. Affording to him security for their bearing along with him,

their parts in the vexation and expense that may eventually attend the operation of claiming those services, in the benefit of which in so far as the claim succeeds, they will receive a share. Mode, obtaining their personal attendance at the seat of judicature for the purpose of their joint responsibility as above: their attendance, or if without preponderant evil it cannot have place, in some other shape such security as shall be deemed sufficient.

4. Next come witnesses — extraneous witnesses. Purposes as follow: —1. In the case of such as come voluntarily, either in the first instance at the desire of the applicant, or afterwards at his desire or that of any of his co-interessees, security against those for whom they attend, in respect of needless and uncompensated vexation and expense in the exercise of that function; of which security they may in case of need be informed or reminded by the judge. 2. Against falsehood on their part, as well to him at whose request they come, as in favour of the party or parties on the other side, to whose detriment, in the minds of those by whom they are called in, they are expected to testify.

5. As to all the several other actors on the judicial theatre, after what has been said, the purposes and uses of this forthcomingness, as well to each as to all, will not require separate mention.

6. So as to functionaries at large, meaning all such other persons as, not being at the time of the application present at the place at which it is made, may come to their posts to act in the judicial drama. In all ordinary cases, for forthcomingness on their part, the official situations respectively occupied by them will afford sufficient security.

In regard to this matter, whatsoever requires to be recommended as most apt, may be comprised in two rules: —

Rule 1. Of all modes of securing forthcomingness, immediate or eventual — of all modes that promise to be alike effectual, choose that which, with reference to the individual in question, at the time in question, promises to be the least vexatious.

Rule 2. In each case, where the most efficacious is at the same time the most vexatious, weigh against the evil of vexation from execution, the evil from the diminished probability of ultimate execution, and embrace that mode which promises to be the least vexatious.

For this purpose, the circumstances of the individual will in each case require to be taken into account. From the nature of the suit alone, no well-grounded judgment can be formed.

At the commencement of a suit, actual forthcomingness is necessary for one purpose; eventual forthcomingness, and actual security for it, at another time.

In so far as, on the part of the individual in question, testification in the presence of the judge is necessary (or for any other purpose,) the forthcomingness necessary is actual forthcomingness: in so far as such testification is not necessary, actual forthcomingness may not be necessary; eventual forthcomingness, and thence present security for eventual forthcomingness, may be sufficient.

For thus obtaining and securing compliance respecting forthcomingness, the means employable are either such as operate on the body, or such as operate only on the mind: in the first case, they may be styled prehensive; in the other case, accersitive. To employ the prehensive means, is to cause the person in question to be secured wherever he is, and (as a thing moveable might be) brought to the place at which the operation, whatever it be, which it is decreed to perform on him, may be performed: in the case here in question, that of causing him to speak in relation to the subject in question.

The prehensive is always the most vexatious: it ought, therefore, never to be employed but under the expectation that the accersitive will not suffice.

To things, the prehensive is the only one of the two means which the nature of the case admits of. But the prehensive may be performed either by the person in whose custody they are, or by the functionary by whom, if performed upon him, the prehensive would be performed.

When things alone are the intended object of prehension, the appropriate instrument is therefore (unless effective reluctance be apprehended) an instrument of accersition addressed to the person, coupled with an instrument of mandation, requiring him to prehend and adduce the thing.

On what occasions — in what shapes, may forthcomingness with most advantage be made to have place; to wit, to the several purposes of eventual execution, probation, and communication, and in each instance, with least damage?

In so far as the sole purpose in view is the production of forthcomingness, the sole purpose in view is the production of compliance on the part of him in relation to whom the desire is, that he be forthcoming: the question, therefore, respecting forthcomingness, may be changed into a question respecting compliance. The individual being supposed to be, as to the purpose of compliance, forthcoming; which is the most efficacious course, and, at the same time, the aptest in other respects, that can be taken for the securing of compliance?

The problem then here is, at the commencement of a suit, in case of apprehended reluctance and noncompliance at the end of the suit, how to obtain adequate probability

and assurance of compliance at the end of the suit: compliance, in so far as at the time in question may be found necessary to the giving execution and effect to the decrees, which the judge may eventually see it right to issue.

In other words, what are the obtainable — and of those obtainable, what the most apt, and thence desirable, pledges for the defendant's compliance with such decree as it is in the contemplation of the judge to issue?

Forthcomingness in relation to the fictitious entities termed *rights* — forthcomingness in the physical and proper sense, — actual forthcomingness, cannot have place: not so in the improper, but not the less necessary sense — not so that which may be termed virtual forthcomingness.

As to the mode in which forthcomingness with relation to these fictitious, but not the less valuable objects or subject-matters is capable of being employed, and thence the purposes, to which it is capable of being employed to effect in the most beneficial manner: these are as follows, —

1. In the case of such as are transferable, — eventually employing the right in the character of matter of satisfaction.

2. In the case of those which are untransferable, as well as those which are transferable, — employing them as instruments of punishment: for in so far as abstracted, in that character may the matter of good in this as in any other shape be employed.

3. So the employing them in the character of instruments of constraint or restraint.

The shapes in which nonforthcomingness may have place, — the causes by which at the time in question it may be produced, are —

I. Nonforthcomingness of persons.

1. Take, in the first place, those which have place on the part of a person, and not on the part of a thing. Of these, take the following for example: —

1. Incarceration.
2. Relative confinement (territorial.)
3. Relative infirmity of body, not incurable.
4. Relative infirmity of body, incurable.
5. Relative infirmity of mind, not incurable.
6. Relative infirmity of mind, incurable.
7. Relative infancy.

By relative, understand, in such sort and degree as to the purpose in question, in the individual case in question, to operate superably or insuperably, as an obstacle to forthcomingness.

II. Nonforthcomingness of persons and things.

Take, in the next place, those cases in which this obstacle is capable of applying not only to a person but also to a thing; at any rate, to a thing of the moveable class.

1. Expatriation precedential or antecedential; to wit, to the time of the application made.

2. Expatriation consequential or subsequential, apprehended.

3. Exprovenention precedential as above.

4. Exprovenention subsequential, or consequential apprehended.

5. Latentcy, — the place kept purposely unknown with relation to the time of the application: this may be antecedential or apprehended, consequential or subsequential, as above.

In the case of persons, forthcomingness may be necessary, and nonforthcomingness a source of irreparable damage, in any one of these capacities: —

1. As subject-matters of wrong or injury.
2. As sources of remedy for injury.
3. As sources of evidence.
4. As instruments of communication; to wit, with reference to such subject-matters, between which, communication is capable of being made to have place.

In the case where, by forthcomingness, a person is capable of being a source of redress or remedy, the means by which he may be so are as follow: —

1. By being compelled to administer satisfaction.
2. By being compelled to suffer punishment, for the general benefit of justice.
3. By being induced, by whatever means, to afford evidence.
4. In particular situations as to *time* and *place*, by being employed as an instrument of communication; to wit, between any of the several subject-matters above brought to view.

Of the want of forthcomingness on the part of a person in any one of the above-mentioned several capacities, irreparable damage is capable of being the result.

Of forthcomingness on the part of things, the purposes may be — 1. Securing from damage, and in particular from irreparable damage, the thing in question, and all who have an interest in it. In the case of a suit of which a thing is the object or subject-matter, these will naturally be, the applicant, and if he has any, his cointeresees.

2. Preserving it from being converted into an instrument of mischief, regard being had to the proprietor, or any other person in whose custody or power it may happen to be lodged.

3. Employing it as an instrument of compulsion or restriction, for the extraction of forthcomingness, or of compliance in any other shape at the hands of any person by whom any interest in it is possessed.

4. Employing it as a means of affording satisfaction, whether identical or compensational, as the case may be: or in default of other means, even as a means of punishment.

The eventual forthcomingness produced for the purpose of execution, whether it be the forthcomingness of a person or a thing, may

be either the ultimate or the instrumental object of what is done. Thus, where it is instrumental, the forthcomingness produced on the part of a person may have no other object than the producing eventual forthcomingness on the part of a thing; or the forthcomingness produced on the part of a thing may have no other object than the producing eventual forthcomingness on the part of a person: the owner of a horse may be taken into custody, for the purpose of causing him to give up the horse; or the horse may be taken into custody, for no other purpose than to cause the owner to pay attendance at the judicatory.

Nonforthcomingness or noncompliance may have been produced by any one of the several causes following:—

1. Want of notice, *i. e.* knowledge of the obligation and demand.
2. Want of power.
3. Want of will.

Supposing notice given and received, either want of power or want of will has been the cause of it.

Supposing power not wanting, only can want of will have been the cause of it.

Of want of power, the cause may be, with relation to the person in question, either intrinsic or extrinsic: intrinsic, as in case of infirmity whether of body or mind, permanent or temporary: if extrinsic, it may be natural or factitious; natural — for instance, the state of the weather or the road, whether in the state of unaptness or distance; factitious, as in the case of an insuperable impediment, imposed by any human hand.

When will is wanting, the deficiency will have its cause in the contemplation either of the immediate or of the ultimate object, in the endeavouring to produce the forthcomingness, as the case may be: in either case, in the contemplation of the suffering which may be the result of it.

When for the purpose of punibility, or satisfaction, forthcomingness of the person does *not* exist, it may still exist for the purpose of testification.

Letters from Europe reach Van Dieman's Land, and a letter from a judge to an individual there, need not find more difficulty in doing so, than a letter from a father to a son. The answer might come either without the intervention of any functionary there, as does in England the answer to a bill in equity; or in case of need, supposing a judicatory upon the plan of this code established there, the ministry of the judge might be employed there, in securing correctness, completeness, and clearness, by *vivâ voce* interrogation, in the same manner as in England.

III. Nonforthcomingness of rights. In this case, no other cause can nonforthcomingness have, than the nonpossession of that authority by which rights are maintained or annihilated at pleasure. In the case of rights, forthcomingness, then, is a state of things which can never fail to have place — nonforthcomingness, a state of things which never can have place.

§ 4. *Of Procedure inter distantes.*

When parties on both or all sides, with sources of personal, written, and real evidence, are all stationary and within the local field of the same immediate judicatory, it is well: and happily, in this case are most suits, and most occasions of demand for suits: and in this case, unavoidable delay, vexation, and expense, are minimized.

But what is unhappily not impossible is, that these several objects, individually taken, may, if fixed, be each of them under a different judicatory; each of them in a state of migration: all of them in the field of one and the same foreign judicatory, of one and the same foreign state; or each of them in a different judicatory of the same foreign state; or each of them in some judicatory of a different foreign state: and of each of these objects, the number may be indefinitely great.

Thus complex, consequently thus embarrassing, may be the state of things for which provision may require to be made.

In so far as the field of operation extends not beyond the local field of dominion of the political state in question (distant dependencies at the same time, with their necessarily half-independent official establishments, out of the question,) the difficulty is not insuperable: nor yet would it be insuperable, if nations so contiguous, that of the dominions of each, some part were nearer to some part of the other than to some part of its own, had each of them to this purpose the same system of procedure. But how distant the prospect is of any such extensive good, in this or any other shape, is but too manifest.

On this occasion, when difficulty is spoken of, it is on the supposition that the maximization of the happiness of the greatest number being the all-comprehensive end in view, the adjective branch has for its end in view, maximization of rectitude of decision, and minimization of delay, vexation, and expense.

But under the current systems of procedure, no such difficulty has place: nautically speaking, all is plain sailing. Knots, how numerous soever, are all dealt with in the same manner; all dealt with in the manner of the Gordian knot. For all of them, one sword serves — sinister interest in the hands of the appropriate constituted authorities, but more particularly those of the lawyer tribe. To maximize the number of suits and defences that will afford lawyer's profit, maximizing at the same time the quantity of such profit extractible and extracted from each — to minimize

at the same time the number of suits that will not afford lawyer's profit: such are the conjunct ends to which, in so far as depends upon that tribe, all arrangements and proceedings under them are directed. As to the maximization of rectitude of decision, taking the law for the standard, it is matter of indifference: as to the minimization of delay, vexation, and expense, it is matter of abhorrence, seeing that minimization of lawyer's profit would be among the results of minimization of expense.

Suppose this case: — pursuer one, defender one; condition of both stationary, but domicile of pursuer in the field of one immediate judicatory — domicile of the defender in that of another.

In this case, the simplest course, and in general perhaps the least inconvenient, will be for the plaintiff to repair in person to the defendant's judicatory. To the plaintiff, this arrangement will be the most convenient in respect of the faculty of judicial compensation — a faculty which, if the right be on the pursuer's side, will be in most cases of prime use to him, and cannot, in any case except in respect of the vexation and expense of migration, be in any way disadvantageous to him.

Note, — that by the rules of procedure, preference in respect of priority in hearings should on this account be given to parties coming from a distance: for the like reaon, so also to extraneous witnesses.

But what may also happen is, that not without preponderant inconvenience, or perhaps not on any terms, is it in the power of him who would be pursuer to make this migration. In this state of things, either examination through the medium of writing must be admitted, or execution and effect cannot be given to the portion of law on which the right of the pursuer to the services of the judge, for the purpose of his demand, is grounded.

Examination of a person, party, or extraneous witness, through the medium of writing, is, in the nature of the case, performable in either of two ways: immediately without the intervention of any judge; or unimmediately with the intervention of the judge, sitting in the justice-chamber of the judicatory under which the defendant has his abode: — mode, in the first case, the epistolary mode; in the other, the distant-examination mode.

In the case where, through the intervention of writing, the judge is occupied in the business of examination as above, the writing must have been addressed to the judge. For suppose no such writing addressed to the judge, and yet the judge employed, the case must be, that though the pursuer is not present, some substitute of his is; and if so, the case is the same as if the pursuer himself were present, except that the defendant has not in this case the benefit of extracting information and admissions from him, as if he were on the spot.

It being supposed that it is by the medium of writing addressed and communicated to the judge that the examination is performed, what is possible is, that the instrument of examination consists of nothing more than a string of interrogatories, to which it is the business of the judge to extract answers. In this case the examination is performed in the same manner as when, in the English equity courts, the examination of an extraneous witness, or of a party considered in the character of a witness, is performed.

In that case, be the importance of the cause ever so great, this vital function is abandoned to some obscure underling whose name is never known, and who acts in secret, no third person being present, and who in relation to the matter in dispute has no other information than what the interrogatories give him — a sort of information which in the case of the epistolary examination of a defendant by the initiatory discourse of a pursuer, termed the bill, is not admitted as sufficient: to authorize the exaction of an answer, a correspondent assertion on the part of the pursuer is made indispensable, though that assertion is, without check or pretence of check, allowed to be false, and is so perhaps as often as not.

As to these two modes, there seems no reason why the option of them should not be given by law to the pursuer: in some circumstances, the one will be the more advantageous to him, supposing him in the right; in others, the other.

If performed in the purely epistolary mode without the intervention of the judge, the examination of the defendant will in so far be performed in the same manner as under the authority of an English equity court it is performed on a defendant, in and by the initiatory instrument called a bill; except that in such bill, to the string of interrogatories is prefixed a vast mass of irrelevant matter composed of lies and absurdities, such as in any system of procedure which had justice for its object, never could have had place.

In this case, unless by accident, the pursuer's judicatory has at command some means of justiciability, sufficient in the case in question to ensure compliance (property, for example, susceptible of prehension,) the pursuer will not have any means of securing ultimate compliance with his demand, nor in the meantime, responsion to the purpose of giving effect to it, without the intervention of the defendant's judicatory.

Under these circumstances it seems scarce possible to secure prompt and effectual responsion without full communication on the subject with the judge — a communication not less full than what would require to be

made by the pursuer to an agent of his own. On the part of the defendant, suppose (what will always be the most common case) complete reluctance, the following are the courses which it will take: —

1. In the first place, non-responsion, viz. down to the last moment, and for the procurement of toleration, excuse upon excuse, if any, are admitted. True it is, that for securing the correctness of such excuses, and thence the absence of them, where no proper excuses have place, punishment for mendacity, insincerity, or rash assertion, will in course be impending: but of such restraining powers the efficiency cannot in every case be complete. For, with a little ingenuity, under circumstances tolerably favourable, excuses, which if they came of themselves would be just andyadequate, may be brought into existence.

2. The stores of non-responsion being exhausted, next comes insufficient responsion: on the defendant's part, the insufficient responsion; on the pursuer's part, indications of the sufficiency, with directions for the supply. To the length of this series — to the number and respective magnitude of the terms of which it may be composed, it seems not easy, if it even be possible, by any general view that can be taken of the subject, to set limits. For producing the effect that would be aimed at by any such limits, a course that presents itself is this: — on the pursuer's part, facts, which if true would be sufficient (notwithstanding anything that could be said on the other side) to substantiate the pursuer's claim, are hypothetically asserted, accompanied with a statement, that to that special purpose, true or untrue, unless sufficiently contradicted, they shall be regarded as admitted.

Hence, on a general view, may be seen the difficulties with which, in every case in which there is no judicial confrontation of parties, a pursuer may have to contend. Without his presence, an agent, however ample his instructions, though acting in the presence of the defendant as well as the judge in the distant judicatory, may be but an inadequate substitute.

If an agent chosen by the party as the most likely, more so than any other person he has access to, to espouse his interest with the greatest warmth, and thence to apply his faculties, such as they are, to the subject with the strongest force of attention, is liable to be thus inadequate, — still more so, generally speaking, will be the judge. Skill derived from appropriate practice and experience, say still greater; but for the natural deficiency in the article of zeal, it were too much to expect that, by any extra magnitude of skill, compensation will in an adequate degree be made.

What may be said in general is, that the less complicated the case, the greater the probability is, that, without the judicial confrontation, examination in the epistolary mode can be made sufficient for a well-entitled pursuer's purpose. To make his option between the two modes, will therefore rest on the pursuer in each individual case.

A case in which the services of the distant judge might be employed in this good work with particular advantage, is this: a pursuer by reason of his occupation or state of health, is incapacitated from migrating to the distant judicatory, and staying there for the requisite time; and moreover, by the state of his pecuniary circumstances, incapacitated from engaging the services of a professional, or other apt agent. Here might be a case of compassion, calling for the conjunct operation of the judge of the pursuer's judicatory, and the judge of the distant judicatory, namely, the defendant's judicatory. The pursuer-general, in his quality of advocate of the poor, extracts from the mouth of the pursuer, in the presence of the judge, facts which, in his view, and in the view of the judge are, if true (the contrary of which he sees no ground to suspect,) sufficient to constitute an adequate ground for the pursuer's demand; at any rate if supported by such evidence as the pursuer, subject to punishment as for insincerity, has stated as being about to be proved by such persons as he has given indication of.

The minute in which this evidence is contained, being authenticated by the signatures of the pursuer-general and the judge, accompanied with such explanatory observations, if any, as shall by them have been deemed requisite, is transmitted by this same judge to the judge of the defendant's distant judicatory, with a request to him to convene the defendant, and proceed thereupon as the justice of the case may require.

What has been above observed in relation to the case where, at the instance of a pursuer, a defendant is at the commencement of a suit to be examined, will, to an extent more or less considerable, be found to be applicable to the case where, on that same side, or on either side, a person is to be examined in the character of an extraneous witness. Considered merely in the character of a witness, one part of that which would commonly compose the subject-matter of examination in the case of a defendant, has no place in the case of an extraneous witness. This part is what is composed of the subject-matter of admissions. The facts proposed to be admitted may in any number be facts of which the defendant has no personal cognizance; he not having been, in relation to them, himself a percipient witness, but being satisfied of their existence either from report made to him by percipient witnesses, or by inference drawn from circum-

stantial evidence. From an extraneous witness, nothing in the way of admission, as above, will be relevant; the only facts, the statement of which can with propriety be received from him to the purpose of their operating in the character of appropriate evidence, will be those in relation to which he has been a percipient witness: as to any other facts, if his testimony be in any way relevant — if it be capable of throwing light on the matter in dispute in any way, it will be in the character of purely indicative evidence, giving information of a source from whence appropriate evidence may, it is supposed, be extracted.

As to indifference, although it may have place, and of course not unfrequently will have place, it is, however, no more to be depended upon, consistently with common sagacity, in the case of an extraneous witness, than in the case of a party — on the occasion here supposed, a party on the defendant's side. By interest in every imaginable shape, self-regarding, sympathetic, and antipathetic — by a tie of interest, of any degree of strength from that of a cob-web to that of a cable — from the slightest imaginable, up to an interest equal in strength to that of the party himself, or even greater, may the affections and correspondent conduct (that is to say, on the present occasion, the discourse of the extraneous witness,) be determined. By correspondent variations in respect of frame of mind as between a party defendant and an extraneous witness on his side, the bias towards that side in the mind of the extraneous witness may be made even stronger than that in the mind of the defendant himself. Many, there can be no doubt, have been the occasions on which, for the purpose of giving support to the side of a defendant in a suit, in which, for the advancement of his own interest, the defendant would not have transgressed the line of truth, an extraneous witness has, without solicitation on the defendant's part, or intercourse held with him immediately or unimmediately, transgressed that same line in such sort as to have fallen into the guilt of perjury.

Of these observations, what is the practical bearing on the case here in hand? It is this, viz. that as to reluctance in the mind of an extraneous witness, a degree of it may not unfrequently have place, not inferior but even much superior to any that has place in the mind of the defendant himself. In a way perfectly simple and intelligible, a difference not greater than that which is continually exemplified between two persons standing in these two relations one to the other, will suffice to realize this at first sight apparent paradox, without recourse to any such untangible state of things as that of a difference between two minds. The supposition is realized as often as an extraneous witness in indigent circumstances has in expectancy a benefit, the value of which to him in his circumstances is greater, than to the defendant in his affluent circumstances is the value of the whole subject-matter of the dispute.

Generally speaking, in the situation of extraneous witness, the quantity of matter required to be extracted from a man will be, to an indefinite amount, less abundant and more simple than what will require to be extracted from a man in the situation of a party defendant. Most commonly, the fact in relation to which he will be called upon to testify, will be some one fact, in relation to which he has been a percipient witness; while the facts which, for the purpose of one and the same suit, a pursuer may have need to establish as against a defendant, may be indefinitely and highly numerous.

The practical conclusion is, that, generally speaking, examination in the epistolary mode, with or without the intervention of the judge of the distant judicatory, will be more frequently found eligible, as applied to the situation of an extraneous witness, than in its application to the situation of a party defendant.

As it can seldom fail to happen that, in the situation of pursuer, a party may have need to extract admissions or testimony, or both, from the lips or hands of a defendant, so what will be continually happening is, that on his part, the defendant may have like need to extract admissions or testimony, or both, from the lips or the hands of the pursuer.

Under the authority of the English equity courts, where this sort of reaction has place, the lawyer tribe have given themselves the benefit of making for themselves an additional suit out of it. This suit is called by them, a crossed suit, or a cross cause: and forasmuch as, on the part of the plaintiff and his professional advisers and assistants of all classes, reluctance in respect of admissions and testimony may be not inferior to what it is on the defendant's side, hence it is, that by a state of things thus frequently occurring, the delay, vexation, and expense, with the profit extractible and extracted out of the expense, is doubled: and this in the perhaps comparatively rare case (relation had to the sort of causes carried into those courts,) of a suit so simple as to have no more than one party on each side.

So much for testimonial evidence, received or extracted for the purpose of the suit. Remain, ready-written, and real evidence. In this case, comparison had with those which precede, but little difficulty has place: on the part of the written document, no reluctance to the being produced; as little in the case of real evidence, unless a possible exception be considered as having place in the case of an

animal, to which, while perception is ascribed, reason is denied. But in this case, whether it be a canary bird or an ostrich, a Guinea pig or a royal tiger, no obstacle imposed by reluctance is apt to be found insuperable.

But all ready-written evidence, and all sources of real evidence, have this in common with one another, and with every source of oral evidence, viz. that they are in the custody of some keeper; and on the part of this keeper, whether it be in the character of party defendant or extraneous witness, reluctance in any degree may have place.

The case is not much varied, where instead of appearing in the character of a source of evidence, the written instrument, or the other thing in question, of whatever sort it be, has need to be made forthcoming in the character of a subject-matter of the dispute. Of the demand on one side of the suit: of the defence on the other. The same horse which constitutes the subject of the pursuer's demand, and which, in case of success on his side, will be to be delivered into his possession, may in the mean time be to be inspected, for the purpose of ascertaining the condition the animal is in, and thence its value.

In the cases last mentioned, the difficulty of obtaining, at the hands of a relatively distant judicatory, the assistance requisite to justice, may be considered as being at its minimum.

Ready-written evidence affords modifications in relation to which, appropriate arrangements will require to be made in detail.

Documents, of the contents of which the temporary concealment is necessitated by some exigency of the public interest, must not, during the time of such concealment, be rendered accessible at the command of private exigency or private artifice.

To maximize for all these several purposes, the facility of intercourse between judicatory and judicatory, will be among the cares of the system of procedure. For this purpose alone, were it applicable to no other, the sort of establishment so extensively known under the name of the post, might be worth instituting and keeping on foot, where it is not instituted and kept on foot.

By the transmission of the record itself from the immediate to the appellate judicatory, instead of a transcript, — delay, vexation, and expense, may to no small amount be saved. A transcript would indeed require no more time than the original for its conveyance. But for the transcription, time in no small quantity will be requisite. This time cannot easily be other than official; and of official time thus employed, the quantity cannot be otherwise than limited. Documents liable to be of such importance cannot safely be located, though for ever so short a time, in any other than well known hands. In English procedure, the transmission of a record in the original, from an immediate to an appellate judicatory, is familiar practice: it is the result of the sort of imperative decree known to lawyers by the so unexpressive appellation of a *writ of certiorari*, or for shortness, a *certiorari*. In this case, the document continues at the seat of the judicatory, by the authority of which the transmission of it was exacted.

By retransmission, the purposes of justice may be better served; but among the purposes of the system here in question, the purposes of justice never have had, nor ever could have had place.

§ 5. *Friendly Bondsmanship.*

A friendly, or say accommodating auxiliary judicial bondsman is, as we have seen, a person who, on the occasion and in the course of a suit, lends his aid to one of the parties, by taking upon himself an eventual and future contingent burthen, for the sake and purpose of conferring on that same party a present benefit reputed more than equivalent.

To a party on either side of the suit is this good office capable of being rendered.

It may be rendered in every part of the course of the suit, on any occasion, for any purpose.

Of the case in which it may be rendered to a party on the pursuer's side, an example is as follows:—

According to the evidence delivered by a pursuer, circumstances on the part of the defendant are such, that unless for the giving ultimate execution and effect to a decree establishing the pursuer's demand, arrangements of security are taken, onerous to any degree not exceeding the burthen of such ultimate execution, — the probability is, that the necessary means of giving effect to such ultimate decree would not be obtainable.

In any number, any persons may be co-auxiliary bondsmen for any person.

But it will be for the care of the judge that this accommodation be employed in such sort as not to produce without his intention a commutation of corporal for pecuniary punishment.

In respect of judgment, attentiveness, and even probity, the reputation of the judge stands pledged for his not suffering this faculty to be employed as an instrument for the evasion of justice, as by acceptance given to bondsmen whom the event shall have shown to be insufficient.

Of the demand for security in this or some other shape, the urgency will be directly as the magnitude of the evil to which the proposed defendant will, by being constituted such, be exposed, and inversely as the responsibility of the applicant in respect of his condition in life.

On this occasion, the party primarily benefited is the proposed pursuer; for, but for this benefit, the benefit which by the legislator is intended for him, might by the judge be denied.

The security thus afforded to a proposed defendant against vexation at the hands of a proposed pursuer is but one of divers securities, of which, on every occasion on which by the judge a security is regarded as necessary, the least burthensome will be preferred.

Where the co-sponsors, or say co-accommodationists, are more than one, the loss will be divided according to pecuniary circumstances, as in cases of compensation for wrong.

On the accommodation-engagement instrument, the matter of the accommodationist's code will have been printed. A separate register will in every judicatory be kept, under the name of the accommodation-register.

In the accommodation-register, on the occasion of each individual-accommodation-engagement, from this elementary matter, general matter under correspondent heads will be deduced at the end of each year, for the whole of the year: —

1. Name of the suit, and the occasion on which the accommodation bond is entered into.

2. Inconvenience saved by the accommodation-engagement.

3. Party to whom the inconvenience was saved.

4. Person on whose application to the judge, the engagement was entered into.

5. Time during which the engagement is to continue.

6. Result of the engagement — the inconvenience incurred or prevented.

Subject-matters, which for the purpose of securing compliance to a judicial mandate are in general capable of being acted upon, are property and person: by possibility, reputation and condition in life; but so rare and extraordinary are the cases in which to this purpose they are capable of being acted upon, and so precarious is the success of any endeavours for that purpose, that they may be put aside as not worth insisting upon in comparison with either of the two others; to wit, person and property.

In regard to property, a circumstance that presents itself at first view is, that in the case of a great part of mankind, persons under age included, or in the case of a considerable proportion, indeed considerably the greater part, co-subpossession has place.

To execution, whether provisional (or say instrumentary) or definitive, cooperation on the part of him at whose charge it is to be performed, may be necessary or not: if, and when necessary, *compliance* on his part requires to be produced.

Universal accommodation having been the end in view of this institution, in so far as it has any end in view, such accordingly is the use and application hereinabove made of it. Occasions, as many without exception as those in which this effect could be given to it; sides of the cause both, on the one with the same facility as on the other; number of persons admitted to the exercise of this beneficent function, in whatsoever number disposition is found to have place, and the exigency of the case is found to require: number no more than one, where the means and situation in life of that one are sufficient; number to any amount greater than one, where for the eventual sum necessary to constitute the security, a smaller number will not suffice.

How in these several respects stands English practice? On the plaintiff's side, to afford a warrant to the burthen imposed on the defendant, this security, originally with parade established, has little by little, as it were by stealth, and for the evident predatory purpose above intimated, been withdrawn. Number in every case two, however superfluous one of the two might be; number never greater than two: consequence, where two could not be found to make up the quantum of security thought fit to be exacted, the security not given, and for want of it, the inconvenience, how great soever, imposed.

No facility is allowed of acting upon property. On the other hand, — on person, such is the facility afforded for operating, that within the memory of man, any person might, on pretence of giving commencement to a suit, for a longer or a shorter time as it might happen, deprive any man whatsoever of his liberty, without having, or so much as fancying or pretending to fancy that he had any right to do so. Against wrong by abuse made of this unbounded power, no security afforded beforehand, no remedy by compensation afterwards. At one time, indeed, something in the way of security was provided: witness the clause *si fecerit te securum*, with which the order of the sheriff, authorising and commanding him to exercise this afflictive power, at one time commenced. By this clause, of which originally some sense of shame had produced the insertion, a certain limit was applied to abuse. But by limit thus applied to abuse, limit was applied to profit, and no such limit could judicial rapacity endure.

Thus was the liberty of every man sold to every man who would pay the price for it, without any other pretence than an intention to pursue a claim of debt for any amount, how small soever, and without charge of crime in any shape.

But when crime was imputed, and intended to be prosecuted — crime to any amount, how-

soever large; then came tender mercy, and caution, by which a vast and complicated system of machinery was set to work, and proportionable uncertainty and chance of escape for criminality produced. Now was set to work the grand jury, with the number of its members necessary for concurrence, from twelve to three and twenty, to take cognizance of the sufficiency of the grounds on which this power was applied for, and oath of secresy taken by all its members, lest by disclosure the person whom, on hearing evidence, they had pronounced guilty, should find means of escape; which escape might on every occasion be produced without the smallest difficulty or danger on pretence of tenderheartedness, by any one of a set of men by whom, in the capacity of petty juryman, after difference of opinion, no verdict could ever be given without commission of perjury. — Contrast this tenderness for, and security afforded to all criminals, with the utter denial of all security to those to whom no criminality in any shape was so much as imputed, by an oppressing adversary.

The first occasion on which the alleviation of this hardship was conceded, was that on which it was granted to a suitor, who in the character of a defendant had been punished as above, without so much as pretence of criminality on his part in any shape. If two persons could be found, each of whom in case of his escape, was content to bind himself to double the amount of the sum claimed on the score of debt, he was then, in the event of their being approved of, and so binding themselves, released from imprisonment, after having suffered it till they could be found. These bondsmen were, by a joint appellation, termed bail. No bail, no release.

CHAPTER XIX.

COUNTER-SECURITY.

§ 1. *Counter-security, what.*

COUNTER-SECURITY, is security for the defendant against oppression, designed or undesigned, producible at the instance or on the behalf of the pursuer, by the exaction of preliminary security for the reddition of the service demanded by the pursuer.

It is constituted by, and is in proportion to the responsibility, satisfactional and punitional, eventually imposed on the pursuer; to wit, in case of oppression, as above; particularly if falsehood be employed in the production of it.

Considered as to the person on whom imposed, it is either direct — (directly seated;) or collateral —(collaterally seated;) directly, in so far as imposed on the pursuer alone: collaterally, in so far as imposed on a pursuer's bondsman, whose consent to be subjected to the burden has been procured, by some tie of self-regarding or sympathetic interest.

Considered as to time, it is either actual, in so far as the burden of it is actually imposed: or eventual, in so far as the burden is only made eventually imposable.

Of the employable *species* of counter-security — of the *shapes* in which, of the judicial operation by which it may be afforded, examples are the following :—

1. Impignoration pecuniary, — exaction of the deposit of a sum of money under the charge of the registrar.

2. Impignoration applied to things moveable, of condensed value: say, for instance, precious stones, or gold bullion, or costly paintings.

3. Impignoration applied to things moveable, of ordinary value: for instance, household furniture, or stock in trade in any shape, by consignment to some special trustee, located by the judge.

4. Impignoration, applied to a thing immoveable, by consignment as above.

In these last three cases, the impignoration may be termed quasi-pecuniary.

5. Impignoration of miscellaneous and detached rights, by suspension and eventual ablation of them.

6. Impignoration applied to the person — by incarceration for safe custody.

7. Impignoration, by quasi-incarceration, confinement within boundaries not physical but ideal, prescribed by mandate.

In choosing the species of counter-security, the judge will have regard to the following rules: —

Rule 1. Prefer a shape or species, by means of which compensation may eventually be afforded to the defendant so far as it goes, to any by which no such satisfaction can be made to be afforded. Hence,

Rule 2. Give to the security the pecuniary or quasi-pecuniary shape, according to the amount of it, in preference to every other.

Reasons: By the burthen of compensation, the effect of punishment, according to the amount of it, is produced; whereas by barren punishment no such effect as that of compensation is produced.

As to satisfaction in a vindictive shape, this would equally be produced by compensation to the same amount.

Rule 3. In so far as sufficient, prefer the least afflictive shape: accordingly, annoucement of eventually imposable, to actually imposed.

Rule 4. In so far as consented to, employ counter-security with less reserve, than the preliminary security. Reason: The individual is the most competent judge of the degree of the afflictiveness in his own instance:

if the burden be too afflictive, he will not subject himself to it.

Rule 5. With a view to degrees of afflictiveness, never lose sight of the difference between the situation of the two parties, in respect of pecuniary and other circumstances.

§ 2. *Counter-security, need of.*

The need of counter-security is produced by, and proportioned to, the magnitude and probability of the evils which, by prehension and adduction of the individual, are liable to be produced for want of it. These evils will have their rise, partly in the situation of the proposed defendant, partly in the disposition and situation of the pursuer.

Of the evils liable to be produced by the situation of the proposed defendant, examples are as follows:—

1. The proposed defendant, labouring under a disease for which a distant climate is, by medical advisers regarded as affording a probable, and the only means of escape from impending death. Effect of the execution, of the prehension and adduction mandate — the same as that of a sentence of death pronounced and executed.

2. The proposed defendant is on the point of embarking with a cargo for sale, in which the whole of his capital is invested: before he could have been set free to embark, the vessel has sailed, and, within the time, no person able and willing to undertake charge of the cargo could be found by him. The consequence is, a part more or less considerable spoilt, purloined, or sold to a loss: to the amount of the loss no assignable limit. Effect of the mandate, fine with execution to that amount.

3. In the vessel went a female, to the proposed defendant an object of matrimonial pursuit with prospect of success: the female faithless; consequence, her marriage with another: loss indescribable and incalculable.

4. Destination as before: the female a new-married wife. In the vessel, or on arrival, she finds a seducer; consequence, seduction: loss again incalculable.

In each instance, — cause of the evil, accident, — or sinister design. If sinister design, for proposed defendant, say *victim* or *intended victim*.

1. In case of the disease: victim, say a rich proprietor: machinator, a next of kin, or expected legatee.

2. In the case of the emigration with a cargo: machinator, say a rival trader.

3. Victim, the disappointed lover: machinator, the successful rival.

4. Victim, the new-married husband: machinator, the seducer.

In no one of these cases, unless specially provided against as below, does the machinator stand necessarily exposed to legal responsibility in any shape. To the accomplishment of the design, no mendacity, punishable or so much as unpunishable, is necessary. Many are the ways in which, for any such purpose, the machinator may, in relation to the intended victim, contrive to place himself in the situation of creditor.

In the shape of a bill of exchange in which the proposed victim stands as drawer or indorser: in this shape, or no matter in what other, he obtains the efficient cause and probative evidence of a debt which, without injustice or imprudence, the debtor may have left outstanding, having before his departure left in proper hands funds adequate to the purpose.

Nor is it necessary that the hand by which the evil is produced should be that of the principal and prime author. It may be by that of an instrument of his, rendered such by deceit. When the maiden has lost her lover, or the wife her new-married husband, the seducer, full of sympathy and assumed wrath, flies to her relief, and wins her affections.

Of disposition on the part of the pursuer, examples have been seen as above. His situation, unless appropriately modified by counter-security — his situation, in the case of sinister design, whether principal, or instrumental and accessary, as to effective responsibility in every shape, is completely irresponsible.

Happily, in the general run of cases there will be little difficulty. On the one hand, the nature of the service demanded, coupled with the situation of the defendant, will not require for the securing compliance on his part (or at any rate the effect sought for from his compliance,) the imposition of any such vexation on his part as would present a serious danger of ultimate injustice; and the less the danger from the direct security at the charge of the defendant, the less would be the evil produced by the vexation of counter-security at the charge of the pursuer to prevent him from contributing, through sinister design or negligence, to impose the first-mentioned vexation on the defendant.

But no evil which it is or may be possible to exclude without preponderant evil, should be suffered to pass unheeded or unprovided against, by the legislator, or that of his servant the judge. In their respective accounts with the public, every such individual instance of evil that presents itself will be to be set down under the head of loss: as the cases of most frequent occurrence will be provided for with most care, neither will those of the least frequent occurrence remain neglected; especially since, in whatever part of the field the provident eye of the legislator may have left a pit-fall unclosed, evil-doers, whose eyes will

by stronger sinister interest naturally be rendered stronger than his, will be at work to widen it.

On this occasion, the antagonizing objects which, in the quality of elements belonging to the calculation in the character of elementary quantities, present a demand for consideration, may be thus stated: —

1. The importance of the service — of the effective service demanded by the pursuer at the charge of the defendant. This will vary, from that of the smallest sum of money which can be the object of demand, to that of the severest suffering to which the law has exposed men, in the hope of keeping excluded the severest evil which man is exposed to suffer from human delinquency. In this element may accordingly be seen included two others — namely, the magnitude of the punishment, and the magnitude of the crime.

2. The magnitude of the vexation to which, for the purpose of preventing the defendant from withdrawing himself from under the burthen, should he be so inclined, it may be necessary to subject him to, while the proof of his being bound to render the service remains as yet incomplete.

3. The magnitude of the inducement by which a person in the circumstances of the pursuer may be led to bear his part in subjecting the defendant to such precautionary vexation in the case in which it is undue, whether it be that the service demanded of him is not due, or that, for preventing him from eluding it, a precaution so burthensome as that which is proposed is needless.

In the case of counter-security against judicial oppression in favour of a defendant, the following are the circumstances by which the magnitude of the provisional or eventual burthen to be imposed on the pursuer for this purpose will require to be governed: —

1. The magnitude of the burthen imposed on the defendant by the direct security — the security for execution.

2. The effective responsibility, satisfactional and punitional, of the pursuer, as far as can be collected from his or her condition in life and pecuniary circumstances, or so far as already notorious or known; or by examination or inquiry directed to the purpose or the occasion in question, ascertainable and ascertained.

Consequently, when on the pursuer's side there are parties more than one, as many different means of counter-security, if circumstances require, may be employed, as there are parties on that side.

In a punishment requiring purely public care, the government advocate being sole pursuer, no means of counter-security can be requisite.

In the case of a punishment requiring publico-private care, as well as in the case where the service demanded is satisfaction merely, without punishment, means of counter-security at the charge of the private pursuer may be requisite.

This quantity is again a compound one: its elements on the one side of the account, the profit expectable from the offence; on the other side, the loss, by the suffering to which by the commission of it, it will appear to him that he will expose himself.

Here then comes in the consideration of the counter-security exigible.

In this counter-security may again be distinguished two branches; one composed of the evil which the law may have attached to the general demand of the ultimate service in question, in the event of its proving groundless; the other, of the evil attached by it to any special demand made of the incidental service, consisting in the exaction of the security for the defendant's compliance, or what is equivalent to it.

The person to whom the responsibility attached to the general demand, on the supposition of its proving ungrounded, will apply, is of course the pursuer. But a person to whom the responsibility attached to the special demand of the extra-security applies, may either be a pursuer or an extraneous witness; for the question as to whether the ultimate service demanded is due, and the question whether the precautionary security antecedent to full proof is necessary, are two perfectly distinct questions: between the sets of facts to which they respectively relate, there may be no connexion whatsoever.

As to the quantity of vexation necessarily attached to the situation in which the defendant must be placed, in order to secure on his part the compliance necessary to the adduction of evidence on both sides, the maximum will in general be comparatively inconsiderable: restraint on his liberty of locomotion during the time necessary for the adduction of the evidence on his side, or the time, at the end of which the pursuer will have adduced the whole of his evidence, or in failure of it, suffered the dismissal of his demand; of these two periods, the longest, whichsoever it may be. But from this restraint, temporary and short-lived as it may be made to be, evil consequences, serious in duration as well as magnitude, to an indefinite degree, may in some cases be included. Of these, lest the general conception formed of them should be inadequate, it may be necessary to bring to view a few examples.

In the view of exhibiting in its greatest possible dimensions the evil liable to be produced by a short-lived restraint on the liberty of locomotion as above, a course that would be apt to present itself is — the placing at the highest point that could reasonably be assumed, the mass of the matter of opulence

capable of being thus wasted or injuriously transferred. This course would, however, be a delusive one. The greater the quantity thus brought to view as capable of being wasted or ill bestowed, the more rare would be the examples of its being in fact thus dealt with. On the other hand, the magnitude of the evil (in its first stage at least) — the magnitude of the suffering, is not by any means proportioned to the magnitude of the sum which is the instrument of it. Of the suffering produced by a loss, the magnitude is not as the *absolute* amount of the sum lost, but as its *relative* amount, relation being had to the aggregate mass of the property of the loser: to a person the value of whose whole property does not exceed eleven pounds, the loss of ten pounds may produce at least as severe a suffering as to one who has eleven thousand pounds, a loss of ten thousand; while the number of those who are susceptible of a loss of ten pounds is perhaps a hundred times as great as the number of those who are susceptible of a loss of ten thousand pounds, leaving a remainder of not less than one thousand pounds.

Perhaps by no one of those, by whom the functions of legislation have as yet been exercised, has this only true measure of good and evil, as dependent upon the matter of wealth, received due, if any attention. In his eyes, the sum which, with relation to his own circumstances, is of no importance, is absolutely destitute of importance; what is trifling to himself is, in his view of the matter, trifling in itself. Of this error what is the cause? Answer: Want of sympathy. But of sympathy in this case there are two modifications — sympathy of affection and sympathy of conception; and distinguishable as they are, intimately connected with one another are these two modifications: each is to the other cause and effect. Of that for which a man cares little, his conception is proportionably faint; and concerning that of which his conception is faint, his care is proportionably inconsiderable.

Thus much as to security: now as to counter-security. Proportioned to the danger impending over the condition of the defendant, in respect of the loss and vexation he is liable to be subjected to, by the security exacted of him at his charge as above, is the efficiency requisite to be given to the counter-security, the object of which is to protect him against that danger.

In this case, the eventual suffering, if it be adequate, that is to say, certain of outweighing the profit from the wrong, must be indefinite: in duration, co-extensive with the whole of life; for supposing it limited, though for example to imprisonment for so great a length as twenty-one years, a person who, by rivalry, for example, in trade or marriage, had been rendered an adversary to the defendant — if it were simple imprisonment might render it worth the while of another who had nothing, to inflict the calamity on the defendant by a mendacious statement of facts, which if true would create an adequate demand for the security: and this, too, even under a full assurance that upon hearing the evidence on both sides, the falsity of the statement would be brought to light, and infliction of the appropriate punishment on the false witness a certain consequence.

By incarceration, continued down to the time at which the truth of the statement has been either proved or disproved, the testifier in question would be eventually subjected to this indispensable punishment, thus seen to be indispensable.

On the other hand, suppose the statement true, the actual suffering might, and naturally would, be confined within narrow limits; and supposing it voluntarily submitted to, as in a state of things frequently exemplified, it might be, the evil would thus by the very supposition be reduced to nothing.

Of all the several modes of affording the requisite counter-security, this is manifestly the most afflictive; and if this be not too afflictive to be employed, still less could any others be.

Thus, then, would stand the case. On the here-proposed plan, no person, for the obtaining of the security, when needless and adverse to justice, would be able to purchase a false testimony; many a person, for the obtaining of the security, where needful and conducive to justice, would be able to purchase true and honest testimony.

By imprisonment, the security may be considered as being in all cases adequate. For the person of the applicant being thus completely at the disposal of the law and the judge, the punishment is, physically speaking, capable of being screwed up in magnitude to the utmost capacity of human sufferance; and thus the evil to which, on the score of eventual punishment, the evil-doer is subjectible, is rendered preponderant over the good of the profit which in any shape it would be possible for him to reap from the evil deed — the sinister design — to whatever degree successful.

§ 3. *Possession-giving security, or pledge-giving security.*

Placing goods in pawn for the purpose of raising money on them, as a security to individuals for the money borrowed on them, is a practice universally notorious, and as universally unobjectionable. In so far as practicable with advantage, not more objectionable should it be when applied to the purposes of justice: on the one hand, to secure defendant against irreparable vexation; on the other hand, to secure to a pursuer a chance which he could not otherwise have, for the obtainment of

service due to him, in some shape in which it would not otherwise be obtainable.

To be made capable of answering the purpose, the property thus placed at the disposal of the judicatory must be of the moveable sort, and actually forthcoming, and placed within the physical power of the judge. Supposing it an unmoveable subject, the nature and character of the security would be quite different. In the character of a security, the only effect it could have, would be that of attaching invalidity to all succeeding instruments by which it was endeavoured to be transferred to other owners.

Against the acceptance of security in this shape in case of need, no preponderant objection can, it should seem, be opposed. With regard to the sensible evil, the great probability is, that it will not come into existence; for unless on the part of the bondsman certainly, and on the part of the security-giver probably, a persuasion to that effect had place, the security would not be afforded. Moreover, supposing it to come into existence, still it is not so much net suffering produced; for that which is taken from the friend of the wrong-doing pursuer, being given to the defendant, who has been wronged by him, the only net loss experienced by the national stock of happiness is the amount of the difference between the pain of loss and the pleasure of gain produced by the transfer of one and the same instrument of enjoyment.

In the case of bondsmanship, it has already been observed, no confinement of the person is in an immediate way made to have place; but in an unimmediate way, if and in so far as imprisonment for debt has place, it may have place. For in the event of a suit against the bondsman, for the obtainment of the matter of compensation, if either by inability or unwillingness, payment on his part is prevented, whatever be the imprisonment which he could suffer for a debt of his own, the same may he be made to suffer for the debt of him to whom in this way he proved himself a friend.

The course of the judge is thus to be steered between two opposite dangers, like that of the mariner between two rocks: —

1. Danger of leaving in the situation of the applicant an injured man without redress, for want of taking the measures necessary to secure forthcomingness in respect of person and property, for the purpose of giving execution and effect to the law.

2. Danger of oppression to the defendant, by vexation in the shape of imprisonment, loss of property, or evil in any such other shape as by the nature of the case it may happen to him to stand exposed to.

The first observation that presents itself is — that in the case of the applicant's offering himself to be imprisoned, the probability of ulterior evil is in case of acceptance extremely small. The probable case is, that in his opinion the justice of his claim is indubitable; and if so, the instant that, by the examination of the defendant, this appears to be the case, the imprisonment is at an end.

True it is, that as before observed, the claim put in by him may be an unquestionably well-grounded one; yet still, if this be the course pursued for the purpose of giving effect to it, evil to the defendant, evil to an enormous amount, and thence undue, may be the result. Here then comes the case where the appropriate warning will be given to him by the judge: —

"Speak the truth; tell us whether the act of power you call upon us to exercise, would not, to the defendant, be productive of vexation in such or such a shape? (mentioning it.) For take notice, that if it would, your demand will not be granted; and moreover, you may be made effectually responsible to him, to the amount of an equivalent for the vexation thus imposed on him at your instance."

Three rules, however, may perhaps serve him for his guidance: —

Rule 1. Parties on both sides equally sincere: of two evils, reparable and irreparable, choose the reparable.

Rule 2. Party on side — say the pursuer's side — *sincere;* on the defendant's, *insincere:* throw the evil on the insincere defendant, although it should be irreparable, rather than upon the pursuer, though upon his side, as far as appears, it may be reparable. Reason: By compliance with the demand, of the justice of which the defendant is by the supposition conscious, it is in his power to preserve himself from this evil: thus, in fact, it is by himself that the evil is inflicted on himself.

Rule 3. Of the magnitude of the evil, either absolute, in the case of a party on the one side, or comparative, in the case of the parties on both sides, no true conception can in any case be formed, unless the pecuniary circumstances of all parties be taken into the account.

Such as have been seen, are the difficulties and embarrassments which encompass the mind of the legislator whose operations are governed by a real regard for the ends of justice.

English practice knows of no such embarrassment. By English judges, who in relation to this part of the field, as in most others of the field of procedure, have saved the superior authority the labour of legislation, no such embarrassment has been felt. Acting with uncontrouled power in the pursuit of its own ends here as elsewhere, the fraternity have been sitting upon velvet.

So long as to those ends no counter-security seemed necessary, no counter-security would they give. Till less than a century ago, by any person, almost any other might, on paying of the price fixed to Judge and Co. —the price at which liberty was sold — be cast into prison. When at last, by the oppression and depredation thus committed, an uneasiness was felt to such an amount as to find its way to the ears of a lawyer-led, self-styled and self-seated representation of the people, a counter-security, such as it was, was established, and that security consisted in an oath — an oath, the sole panacea for so large a portion of the maladies introduced into the body politic by the hands of lawyers — the ceremony called an oath, no matter by whom, any more than under what circumstances, nor to what ends, performed.

Of this nostrum, the insufficiency to all good purposes, in whatever form it has ever been administered, is shown elsewhere. What belongs to the present occasion is the observation, that in this quack medicine consists the whole of the counter-security afforded, on an occasion for which the need of an effectual counter-security is so urgent as it has been seen to be.

Should a man say, "Should my friend fail to do what is required at his hands, take me; commit me to prison, and keep me there, till he does." For the acceptance of no such offer would he find a door left open anywhere by judicial practice; that is to say, in an immediate way, for in an unimmediate way it has been left open with but too much effect.

In this case, then, the only sort of security that is given, is that which is given by self-subjection to collateral responsibility in a compensational shape.

This, however, does not amount to that mode of security which has just been designated by the appellation of the pledge-giving mode. Of an eventual debt the existence is indeed recognized; but of the money due by this debt, the eventual obtainment is left to the same decision, as it would be in the case of the applicant, if no such security as that which is here in question were afforded by him.

Blackstone in hand,—"By the law of this country," exclaims the panegyrist, "no man can be deprived of his liberty, though it be but for a moment, without a charge on oath for his security!" A charge? A charge for which, be it ever so utterly and knowingly false, he by whom it is made, has not in one instance out of many a hundred, not to say thousand, anything to fear!—nothing at all, if either he be too poor or too loosely connected with the territory, to be worth prosecuting; or the victim be too poor to prosecute, or not vindictive enough, and at the same time rich enough, to tax himself to an indefinite amount, for the chance of sending off his injurer to a settlement which perhaps it is his wish to repair to. An oath?—a ceremony which all merchants,* compelled to it by all parliaments, and which all good men and true, instigated by the example of all self-attested receivers of the Holy Ghost, and the frequently repeated instigation or approbation of all judges, are in the face of those same judges continually treading under foot, with conscience in their mouths — a ceremony which enables every petty tyrant, on pretence of preserving the peace, with full assurance of impunity to do with the helpless, that is to say, with nine-tenths of the community, what he pleases.

CHAPTER XX.

REMEDIES, — COMPENSATION.

§ 1. *Degrees in the scale of affluence, how measured for the purposes of compensation and punishment.*

Of a person's place in the scale of affluence, the altitude will be as the amount of his money and his money's worth, directly; or the amount of his pecuniary burthen, and quasi-pecuniary burthens, inversely.

Accordingly, no assessment ought to be grounded on the consideration of his means exclusively: none without taking into the account the amount of burthens as above.

In the account of *means*, or say *assets*, due regard will be paid to the difference between income derived otherwise than from capital, and income derived from capital.

In the account of burthens will be comprised the expense of maintenance, afforded by the party to such dependents as belong to him, deduction made of such earnings, if any, as they are in the habit of making. Of such dependents, examples are the following:—

1. In the case of a married man, his wife.

2. His children, such of them as are under age and unemancipated.

3. Any helpless grand-parent, or other progenitor or progenitors, male or female, with whose maintenance he is obligatorily or habitually charged.

In and for the purpose of assessment made of a mulct imposed, the judge will proceed on conjecture — or say, *vexation-saving* estimate. In so doing, after putting such questions as to him shall appear appropriate, concerning the station occupied by the party in the scale of affluence, stating his means of subsistence as derived from ordinary day-labour, handicraftship, art, profit-seeking profession, or property — stating it at so much per year, or so much per week, — he will there-

* A large mass of these oaths has been abolished by a recent statute. See Note prefixed to "*Swear not at all*," in this collection.—Ed.

upon state the amount of the mulct, declaring at the same time its ratio to the amount of his annual income.

Tables constructed for this purpose, to save time and labour in calculation, will be kept hung up in the judicatory, and form part and parcel of the furniture thereof.

The judge will declare, that from such data as have come to his observation, this is the nearest estimate which he is capable of making.

Antecedently to this declaration, he will have elicited from the examination the amount of the pecuniary burthen. In the ordinary case of a person unmarried, this amount being equal to 0, a word or two will be sufficient for the probation of it. In the case of a female, small is the number of words which in general will suffice.

If, upon hearing the amount of the mulcts (regarding the estimate as excessive,) the mulctee chooses rather to undergo examination for the proof of the correct amount of his means of payment, than pay it or stand bound to pay it, he will declare as much, and the judge will proceed to take his examination accordingly.

Divers circumstances will be apt to concur in preventing an estimate thus taken from being so correct as could be wished. But they are inherent in the nature of the case; and the inability to reach the highest point in the scale of exactness is no reason for omitting to make the nearest approach to it which is consistent with the avoidance of preponderant evil from the same cause.

1. In regard to means. A person who, being attached to this or that profession, derives not from it, as yet, any quantity of emolument which does not to any degree fall short of that which is ascribed to him by the vexation-saving estimate, submits to a mulct which is in truth excessive, to save that humiliation and prejudice to his professional reputation which would be the natural result of the disclosure.

2. In regard to burthens. What may happen is, that a burthen bearing any proportion to his means, may be produced by the obligation, legal or moral, of affording maintenance to the offspring of an unlawful intercourse, or to a person with whom such intercourse is or has been maintained.

§ 2. *Costs the grand instrument of mischief in English practice.*

When, through the instrumentality of an English judicatory, depredation and oppression are committed, costs are in such cases the capital instrument. No complaint so frivolous, but that, with the help of this instrument, the ruin of any one of the vast majority of the actual population may to a certainty be accomplished; and to every one who will make this use of it, a perpetual, and that an ample reward, is continually held out.

By some trifling imputation cast on his reputation by Nokes, a correspondently trifling injury is sustained by Stiles. Under natural procedure, at the first and only interview of the parties before the judge, the matter would be settled between them: Nokes receiving under the hand of Stiles an acknowledgment of the misrepresentation, with expressions of regret for the having given utterance to it, and an ample compensation for the two days of Nokes's time consumed in the application for redress; one, by the application made to the judicatory for the mandate requiring the attendance of Stiles, the other by attendance paid by Nokes in consequence: fees to judge or judge's subordinates, none; fees to advocate or attorney, none: no such assistance being of the least use.

So much for natural procedure. How stands the matter with technical procedure? The suit carried on in the usual manner, at the usual expense; and the misrepresentation being proved, the frivolousness of it at the same time made manifest, the judge informs the jury that they are bound to find for the defendant, but that the damages are at their option, and that the sum appointed to be paid on that score may be as small as they please.

The damages they accordingly assess at a farthing. Defendant triumphs: but the triumph is a dear-bought one. Behind this farthing lies a sum of from £50 to £300 in the name of costs, sadly contrary to the expectation of the unhappy Pyrrhus by whom this triumph has been enjoyed. If he has no more than a moderate share of business, whatever his employment may be, another such triumph is not necessary to the accomplishment of his ruin: the single one is sufficient, when, to his own costs, those of his adversary's are also added.

Who set the plaintiff to work? The attorney: for out of these two or three hundred pounds the attorney pockets no inconsiderable share. Thereupon comes the usual outcry against attorneys — "O, what sad wicked men are these attorneys!"

But who set the attorneys to work? The judges and the House-of-Commons lawyers. By whom else was the system of depredation created and preserved? By the judges was it not created? — by the lawyers in both Houses, their descendants and others linked together by the ties of the same sinister interest, preserved: preserved in a negative way, by care taken never to introduce any measure that can operate as a remedy, completely obvious as is the remedy: positively preserved by standing up, and being known to be in constant readiness to stand up, to oppose with all the zeal that interest and interest-begotten

prejudice can inspire, whatsoever proposed remedy shall bear on the face of it any promise of being productive of that effect.

Is not a reward — a real reward, thus perpetually held out by them to everybody who will be instrumental in the production of the evil abovementioned? Where is the villany in the profit of which they do not look to be sharers? — where is the villany — so long as, instead of punishment, it is reward that they reap from it — they are not at all times ready to do their utmost to render triumphant?

Yet while these men reap the greater part of the profit, and by their tongues contribute might and main to the success of it, the attorneys, who are but the machines for conveying the mischievous matter to their lair — the attorneys, whose share in the production of the mischief is in comparison as nothing — on the attorneys do the people, the silly and unreflecting people, cast all the blame. Thus comes an ex-chancellor, Lord Redesdale (by whose incapacity the unhappy people of Ireland were so long afflicted,) and, as if his own practice had not taught him so completely the contrary, observes the popular delusion, takes advantage of it, and by his false certificates assists in casting on that comparatively innocent branch of the profession all the blame.

By whom was this system of depredation and oppression invented and organized? Was it by the attorney, any part of it? No, but by the judges — the whole of it — the judges, with their partners and accomplices in both Houses for their protection and support.

§ 3. *Burthen of costs minimized.*

Fundamental rule: — Antecedently to the decision as to the question whether any party is in the wrong, and if yes, who, and in what way, and to what extent in the wrong, — to the government, at the charge of the people, for the benefit of the people, in their eventual capacity of suitors, it belongs to take upon itself the burthen of costs, even though from its so doing the aggregate amount should in some degree receive increase. But this will not be found to be the case.

After minimizing the burthen, in so far as it cannot but rest on the parties, one or more of them, the endeavour of the legislator will be to fix it upon each party, in amount bearing a proportion to the degree in which he is in the wrong (or say, to blame, or blameworthy,) regard being had to the distinction between blamelessness, rashness, and evil consciousness.

By the burthen, is here meant the painful sensation, not the pecuniary amount of the loss by which that sensation was produced. For in so far as the location of the burthen has for its object, effect, and tendency, the prevention of future similar wrongs, it is by this sensation, and not by the quantum of the matter of wealth, that the effect produced will be proportioned.

When as between a party on one side and a party on the other side, pecuniary circumstances are to a considerable degree unequal, it follows, that to render the pressure of the burthen equal, it is necessary that the pecuniary burthen should be assessed in a larger proportion on the richer, than on the less rich: that proportion being directly in the ratio of the quantum of the matter of wealth possessed by them respectively.

Here, then, is a case in which, on an account different from that of blame, the pecuniary burthen of costs may be, and ought to be, assessed upon a party, namely, the magnitude, absolute and relative, of the net quantity of wealth in his possession, or at his command.

In this mode of assessment there is nothing anomalous with relation to the other part of the system of government. The object — the declared object at least, of those who have the management of the public expenditure, is to maximize the equality, to minimize the inequality, of the pressure produced by the correspondent taxes: no reason can be assigned why the repartition of the sensible burthen should in this case be determined by principles different from those by which it is determined in those other cases.

Efficient and justificative causes of subjection to indemnificational obligation, in respect of costs of litigation, are the following: —

1. On the part of the obligee, criminality by evil consciousness.

2. On the part of the obligee, culpability by rashness or heedlessness.

3. On the part of the obligee, superiority in the scale of opulence, relation had to the position of the adverse party in that same scale.

Parties with relation to one another are — 1. Adversaries; 2. Associated allies.

Considered with a view to eventual reimbursement at the charge of an adverse party, costs, say *litigational costs*, require to be distinguished into — 1. *Ante*-contestational, or say, *pro*-contestational; and 2. Contestational.

By ante-contestational, understand such as have been incurred by a party, whether on the pursuer's side or on the defendant's side: on the pursuer's side, before he has been constituted such; on the defendant's side, before he has been constituted such.

Exceptions excepted, for reimbursement of contestational costs, indemnificational obligation will not be imposed in any case, without antecedent allowance and authorization of the expenditure, by a mandate of the judge. To a mandate to this effect, give the denomination of a *litigational-disbursement-authorization mandate*.

As a ground for the issuing of a litigational disbursement-authorization mandate, the judge confronts with one another, the two quantities, to wit —

1. The quantity of suffering in the shape of pecuniary *loss*, and other shapes, likely to ensue to the party in question, for want of the disbursement, on the supposition of its not receiving authorization, and thus resting on the shoulders of the disbursing party.

2. The quantity of suffering likely to be produced in the breast of the party on the opposite side, in the event of the burthen being removed to his shoulders, from those of the party or parties on the other side.

In respect of contestational costs, indemnificational obligation will not be imposed, unless pre-authorization for the disbursement has been given by the judge; for if it were, the power of taxation, at the charge of one party, would thereby be given to the other. That to any party, whether in the right or not in the right, no power should be given exercisable at the charge of a party not in the wrong, is manifest.

Nor yet without modification should it be given at the charge of a party who is in the wrong. For in this case, excess to an unlimited amount might thus be given to the burthen so imposed; and beyond what is proper, on the joint consideration of satisfaction and subsequent punishment, whatsoever quantity of money is thus exacted, will be wrongfully exacted: the act is an act of oppression.

In proportion to a man's altitude in the scale of opulence, will be the danger of his falling into transgression in this shape: for in that same proportion is his ability to make the sacrifice necessary.

Of all these transferences, remains the most important, which is the transference of so large a portion of the at present customary mass of judicial operations, from professional hands paid by the party, to the official hands paid by the public; all danger of abuse, from quantum and increase of private profit, being obviated as above.

Immediately or unimmediately — without or with the intervention of other minds one or more — in the judge's mind must have been presented all the objects, by the contemplation of which his decrees have been determined. Behold now the effects, in so far as an intervention of this sort has place. Good in no shape; evil in a variety of shapes: evil even when the assistant employed is of the gratuitous class; evil incomparably greater when he is of the mercenary class.

In the first place, take the case where the evidence on which the fate of the suit depends, is all of it of the nature of personal and orally-delivered evidence: after that, the case in which ready-written or real evidence is substituted or added.

First, suppose the substitute a gratuitous assistant. Note, then, on this occasion, the principal is that one of the two to whom the facts of the case are exclusively or mostly known: this being the ordinary case. In so far as it is to the substitute that they are best known, these evils will have no place: —

Evil 1. Augmentation, doubling at least the quantity of time consumed: instead of the party stating the case at once to the judge, the party has to state it to his substitute, and then the substitute to the judge. Be its amount what it may, this evil is a certain one, being inseparable from the nature of the case.

Evil 2. Misrepresentation applicable to every part of the whole quantity of matter of fact, which the claim on the pursuer's side has for its ground: misrepresentation by the substitute, with correspondent danger of deception and misdecision on the part of the judge.

How infinite the diversity is, which this evil admits of, is sufficiently obvious: endless would be the task of an endeavour to delineate it.

Evil 3. On the part of the substitute, incapacity of securing attendance and narration of such evidence as the supposed percipient witness has it in his power to afford: under no obligation is this witness to afford information to any person other than the judge.

Evil 4. Probable incompleteness and undue partiality of the mass of evidence.

In this state of things, evidence not being obtainable from any witness who is not willing to furnish it — to furnish it in the first place to the applicant, and thence eventually and probably in the judicatory to the judge, at the price of the vexation inseparable from the operation, — an exclusion is thus put upon the evidence of all witnesses who are not more or less partial witnesses.

True it is, that the party himself has no more power than his gratuitous substitute to discover or secure the delivery of reluctant evidence. But for the obtaining it from the authority of the judge, such evidence as the nature of the case happens to afford, he has a much better chance, when stating the case to the judge immediately, than he can have when the judge receives it no otherwise than at second-hand, subject to the danger of omission or misrepresentation, however unintentional on the part of the substitute as above.

Now suppose the substitute a mercenary assistant.

Infinite is the augmentation which the evil receives in this case.

Engaged by sympathy, the gratuitous substitute has no interest different from that of the principal, for whom he is content to subject himself to the mass of vexation inseparable from such business.

Opposite to that of his client (for such, in

this case, is the name given to the principal) opposite in every point, is the interest of the mercenary assistant.

Opposite in respect of the collateral ends of justice: for out of, and proportioned to, the delay, vexation, and expense to which the suit gives birth, are his profits.

Opposite even in respect of the main end of justice, rectitude of decision, — avoidance of misdecision, with execution and effect accordant. For out of misdecision in the suit in question, may arise an appeal, or a new and independent suit.

Obvious indeed is the check opposed to this sinister interest, by regard to reputation; upon which another obvious supposition is, that quantity of business will depend. But the more closely the nature of the case is looked into, the more feeble and inadequate will this check be seen to be. Of this inadequacy the view will be the clearer, when the force of the sinister interest is taken into consideration.

§ 4. *Parties wronged preserved from ridicule.*

An effectual security for appropriate aptitude on the part of the judge, as well as all other public functionaries, is the light of publicity kept directed upon all judicial operations, in all cases except the comparatively small number in which, by reason of this or that special cause, an adequate demand for temporary privacy, or say secresy, has place.

Of this publicity, one effectual mean is liberty to all persons without exception to take notes of everything that passes in the justice-chamber; and to the report founded thereon, to give whatsoever mode and degree of publicity the person in question is able and willing to give to it.

Of the instruction thus derived, the utility will depend upon and be in proportion to the clearness, correctness, and comprehensiveness, as also the exact relevancy, of the matter to which publicity is so given. The end and purpose of it will be counteracted by every lot of surplusage, that is to say, of irrelevant matter, however in other respects innoxious.

But it will be counteracted in a universal degree, and evil opposite to the ends of justice produced, if in the account so published, mention be made of any matter, the effect or tendency of which is to bring down ridicule upon an injured individual, by whom, at the hands of the judge, relief from the burthen of the wrong is sought, insomuch that the injured suitor obtains in the chamber of justice, along with relief from wrong, an addition to, and aggravation of it.

For the prevention of evil in this shape, every judge will, in his judicatory, keep an attentive eye on whatever reports happen to be given of the proceedings in his judicatory, by the public prints.

At the instance of the party wronged, or even of his own motion, he will place to the account of defamation, and consider as a species of the offence so designated, any published discourse, any part of which has for its object the producing mirth at the expense of a person wronged, on the occasion of the application made by him for redress at the hands of the judge: calling forth mirth at his expense, and thereby inflicting on him the species of mental vexation, the production of which is among the results of ridicule.

§ 5. *Female delicacy, how preserved from injury.*

In a certain class of cases, by the course of the discussion, unless the arrangements necessary for prevention be established, the sensibilities peculiar to the female sex will be liable to be wounded, and the suffering produced by wrong will thereby, instead of remedy, be liable to receive aggravation. To put exclusion upon evil in this shape, will be among the objects of the judge's care.

To give, on any occasion, in comparison with the great majority of the people, any preference to those classes which are nursed in the lap of prosperity, would be inconsistent with the greatest happiness principle, and thereby with the spirit and endeavour of the present code. More congenial to that principle — more conducive to equality — would be the opposite course.

But by the culture given by superior education to the human mind, sensibility is on various occasions increased: insomuch, that although from exhibitions and discourses by which, in the mind of a person in a situation in life, occupying a low degree in the scale of education, no suffering would be produced: yet suffering in a considerable degree acute might be produced in the mind of a person occupying a high elevation in that same scale.

§ 6. *Vexation by cheapness of appeal obviated.*

Of appeal, correspondent delay is an indispensable concomitant. Delay has the effect of injustice while it lasts. To all persons whose condition is in any way deteriorated by delay, it has vexation for its concomitant. Evil in this, as in all other shapes, it will be the business of the law to minimize. To throw needless difficulties in the way of appeal, and in particular, to load this remedy with factitious expense, or to omit any means of disburthening it of this obstacle without preponderant evil, would in this stage operate as a denial of justice, as in the immediate stage. On the other hand, as by cheapness in the initiative stage of juridical proceedings, evils would be produced if not accompanied with measures of repression for the restriction of groundless or injurious ones, so will it of

necessity be in the terminative stage. To the prevention of evil in this shape, the following arrangements are directed: —

In a penal suit, if in the opinion of the judge appellate, the appeal was groundless, and to such a degree groundless, that in the mind of the appellant it cannot reasonably be supposed to have been otherwise, power to the judge appellate to add to any punishment susceptible of gradation, which constitutes the whole or a part of the allotted punishment (burthen of compensation included,) any portion not exceeding (one tenth) or (one fifth) of the punishment appointed by the judge immediate.

On the appellant, if the original decree be not reversed or modified, will fall, of course, the burthen of compensation as to all costs imposed by the appeal upon the party or parties on the other side, as well as those imposed upon such party or parties on the same side, if any, as did not join in it.

Power to the judge, in consideration of the pecuniary circumstances of the parties on both or all sides, to reduce this same burthen of compensation in such manner as to him shall seem meet, stating, at the same time, the consideration on which such reduction has been grounded.

To this head belong the arrangements by which, in the sort of case above mentioned, the appeal-warranting function is given to the quasi-jury.

Power to the government advocate, in case of a groundless demand by either party for a recapitulatory trial before a quasi-jury, to demand the imposition of a mulct, on the ground of the damage to the public by the useless consumption of the time of the judicatory.

CHAPTER XXI.

JUDICIAL TRANSFER.

§ 1. *Mode of transfer.*

WHEN, for the purpose of causing the defensive statement of a defendant to be received, or his testimony to be elicited, the judge of the originative judicatory proposes to transfer this operation to the judge of another judicatory, the mode of proceeding is as follows: —

1. By the appropriate mode of conveyance, the judge of the originative judicatory transmits to the judge of the proposed transfer-receiving judicatory, a missive, having for its principal purpose the causing him to fix a day, on which the defendant in question shall, by accersition, or prehension and adduction, as the case may require, be called upon, or made to attend, at such proposed transfer-receiving judicatory. Name of such missive, — Co-operative-hearing-proposing missive.

2. For the information of the proposed transfer-receiving judge, with this missive will be inclosed an exemplar of the record on which has been entered the minutes of the proceedings in the originative judicatory, down to that time.

3. To every party whose demand-paper, or defence-paper, has been received — as also to the defendant or proposed defendant, whose defensive statement or testimony is proposed to be elicited, at the proposed transfer-receiving judicatory, another exemplar will also be delivered or transmitted: or, in case of extra-numerousness, a certain number of exemplars will be sent, for the purpose of their serving, each of them, for the use of a certain number of the parties on that side, their names being accordingly mentioned.

The form of the missive is as follows: —

To the Judge of the Immediate Judicatory R, the Judge of the Immediate Judicatory S, with brotherly regard.

BROWN *against* WHITE.

It being understood that the defendant White has a habitation on your territory, this is to request you to name a day for the hearing of the said proposed defendant, and receiving his defence-paper, and if need be, examining him in relation thereunto, or eliciting his testimony, confessional and self-disserving, and performing any such other operation in relation to the suit, as the justice of the case may be found to require.

For this purpose I herewith inclose No. 1, containing the record of the proceedings down to this day.

When his defensive statement, with his examination relative thereto, if necessary, is made, be pleased to remit to me [ ] exemplars of the record of the judicial operations performed in your judicatory, together with any such judicial instruments as may, on that occasion, have been exhibited.

If, to the judge addressing, it appears that in the judicatory of the judge addressed, the suit may be more conveniently continued and terminated, or continued until a purpose therein named has been accomplished, or found unaccomplishable, in this case he will say, *Be pleased to take cognizance of the suit, and continue it until, &c.; or until by compliance or execution it is concluded.*

§ 2. *Testifying witness, how procurable.*

If for the purpose of examination, to be performed on an extraneous witness, or on a party on either side, the originating judge refers the matter to a co-judicatory, he will transmit to the co-judicatory, for the information of the judge and all parties interested, an exemplar of the record of all proceedings in the suit down to that time.

So likewise he will at the same time transmit to the judge a letter informing him of the address of all who have appeared in per-

son, or by proxy, as parties at his judicatory, for the purpose of their being accersed to the co-judicatory as occasion may require.

At the same time he will give his opinion as to the question, at which of the two judicatories the suit may, in the manner most conducive to the ends of justice, be further proceeded upon, and finally determined.

In case of disagreement, the judge of the original judicatory may, upon his responsibility, persevere in retaining cognizance of the suit until the termination thereof.

In this case, a party whose desire it is that the examination be taken in the post-originative judicatory may, upon his responsibility as to costs, appeal as to the point, to the appellate judicatory — to wit, to that appellate judicatory within the territory of which the territory of the originating judicatory is situated. But notwithstanding such appeal, the judge of the originating judicatory may persevere in proceeding, if, on a determinate account mentioned by him, such perseverance be necessary to the prevention of irreparable damage.

JUDGE'S INTERCOMMUNITY-EXERCISING-MANDATE-ANNOUNCING MISSIVE.

To the Judge immediate of Wootton sub-district, the immediate Judge of Hilton sub-district, with fraternal regard.

BROWN *against* WHITE.

1*st Jan.* 18

Herewith I inclose an exemplar of a prehension-requiring mandate, directed to my prehensor John Holdfast, to be eventually executed in your territory.

CHAPTER XXII.

PREHENSION.

§ 1. *Subject-matter.*

PREHENSION, applied to things, will be with reference to —

1. A thing immoveable; as a house, or portion of land.

2. A thing moveable; as a horse, a cart, a bed, a painting or other product of the fine arts.

3. A stock of things moveable; such as the whole or any part of a man's agricultural stock, or trading stock.

In each of these cases, it may be to be prehended, with or without things which in relation to it are termed *appurtenances*, as being in use with it.

In each case, the prehension-mandate will contain the instruction requisite for distinguishing the *prehendendum*, and prescribe the disposition to be made of it.

§ 2. *Purposes.*

It may be, that either the existence of the subject-matter of the proposed prehension, or the place in which it is lodged, is to the judge a matter of doubt. In so far as this is the case, search for it is necessary to be made.

Of the purposes for which search may be made, examples are the following: —

I. As to persons.

1. A person whose forthcomingness is desired in the character of a defendant.

2. A person whose forthcomingness is desired in the character of a witness.

3. A person in relation to whom a suspicion is entertained, that he or she is illegally detained against his or her will; or though it be not against his will, if within age of lawful consent, by reason of infirmity of mind or body unable to give valid consent.

4. A person in relation to whom a suspicion has place, that although not illegally detained, he or she is kept in a state of undue seclusion.

II. As to things moveable

1. A thing in relation to which a suspicion has place, that it has been the subject-matter of delinquency: for example, in the shape of theft, or embezzlement, or wrongous deterioration.

2. Or that, in relation to delinquency in any shape, or right in any shape, it would serve as a source of written or real evidence.

3. A navigable vessel, or vehicle, in relation to which a suspicion has place, that on search it would be found to be a receptacle containing any such subject-matter of delinquency, or source of evidence, as above.

III. As to things immoveable.

1. A piece of ground, or building, for example, in relation to which, a suspicion has place, that on search it would, in some part of it, serve as a source of real evidence.

2. A piece of ground, or building, for example, in relation to which a suspicion has place, that on search therein would be found some moveable thing which has been the subject-matter of delinquency, as above; or a thing which would, as above, serve as a source of written or real evidence.

§ 3. *Prehension applied to persons.*

Antecedently to the definitive decree, by necessity alone is arrestation of the person justifiable, or permitted.

The cases in which arrestation is ordained or permitted are those in which, but for the security thus afforded, a preponderant probability has place, that the giving execution and effect to the ordinances of the substantive law which are in question, would not be practicable.

Arrestation may have place for any of the purposes following: —

1. Punishment: in the case in which, in virtue of a judicial decree, a person having been sentenced to be subjected to corporal punishment in any shape, he not being in the

power of the judicatory at the time, to subject him to the obligation imposed upon him by his sentence, the performance of this operation is necessary.

2. Stoppage of mischief, or say mischief-stopping.

3. Securing forthcomingness for justiciability; *i. e.* the being in an effectual manner subjected to such obligation as in the case in question the law may require the person of the party to be subjected to.

4. Securing forthcomingness on his part, for the purpose of evidence, or say of testification, for the purpose of his being subjected to interrogation in the character of a relating witness.

5. Recaption after escape.

§ 4. *Conditions necessary to justify the issuing of a warrant of arrestation.*

On the part of him, who for the purpose of securing payment for debt, or the performance of any other service beneficial to himself, at the hands of the individual proposed to be arrested, requires arrestation to be made of any person by a warrant from the judge, a judicial declaration in writing to the following effect is necessary: —

I, A. P. do solemnly and judicially declare as follows: —

1. A. D., in virtue of stands bound to render to me a certain service, the value of which, over and above that of any service claimed by him at my hands, is not less than [ ].

2. It is my sincere apprehension and belief, that unless without delay his person be arrested, and placed at the disposition of this or some other judicatory, he will, by withdrawing his person or property, or both, out of the reach of this or any other judicatory belonging to this State, effectually, in the whole or in part, evade the performance of the aforesaid service.

3. I acknowledge myself informed, that in the event of my being convicted of wilful falsehood or culpable rashness in respect of this my declaration, I shall, by the sentence of the law, be compelled to make full compensation to the individual thus injured by me, as also to undergo such ulterior punishment under the name of punishment as the law ordains; and in the event of my not being able to render such compensation, to undergo any such punishment as in lieu thereof the law has provided.

4. Moreover, that whatever may be the value of any service really due to me at the hands of the aforesaid A. D., still, if for the belief, that the arrestation hereby prayed for is necessary to prevent such evasion as above, there be not seen sufficient ground, I stand exposed to the burthen of compensasation or punishment, or both, as the case may be.

In case of mere rashness, the burthen will not go beyond the full amount of compensation; in case of wilful falsehood, punishment added to the above burthen will be severe.

§ 5. *Of seizure, viz. of property, moveable or immoveable.*

Seizure of things, moveable or immoveable, may have place for any one of the purposes following, viz. —

1. Punishment, viz. of the individual whose property is seized.

2. Stoppage of mischief; the property in question being either a subject-matter, or an instrument of the mischief.

3. Securing forthcomingness for justiciability.

4. Securing forthcomingness for testification; that is to say, for the exhibition of circumstantial evidence.

CHAPTER XXIII.

JURY-TRIAL.

§ 1. *Jury in general.*

ENGLISH law, being the only source from whence, in any other country, any conception relative to the institution thus denominated is commonly deduced, — from this same body of law it is, that any explanation given in relation to it must be deduced. This, then, is the standard of reference which, whether any express reference be made to it or no, must hereinafter be continually borne in mind.

Taken in its most extensive sense, a jury*

* By the denomination *jury*, thus employed, no distinctive intimation is afforded of any of the purposes for which the body of the men thus denominated are employed, or of the class from which they are selected. By a jury, in the original signification of the word, is meant neither more nor less than a body of persons, by whom the ceremony of an oath has been performed. But on occasions out of number, by persons of different classes out of number, separately and collectively, the performance of the ceremony of an oath is, under the English law, likewise performed: in a word, to offices in general, not to speak of unofficial persons and occasions, generally speaking. In the character of an obligation, imposing restraint upon the effects of sinister interest in any shape, nothing can be more generally and completely futile. But the ceremony has two effects, which, under the system of misrule, may, to those who profit by it, be with propriety termed advantageous: one is, the causing a functionary (to whose misdeeds there is in fact no restraint except the will of those his superiors in power, whose sinister interest is linked with his,) whose wish it is to do a thing without being thought willing to do it, to appear forced to do it; the other is, when his wish is not to do it, without being thought willing to escape from doing it, to appear forced to forbear from doing it.

George III. finding three or four millions of his subjects in a state of most abject servitude,

may be defined an occasional body of non-professional and non-official judges, employed to constitute and apply a check to the power of a professional or official judge, or body of judges.

Juries may be distinguished, in the first place, into juries employed for general purposes, and juries employed for particular purposes.

The cases in which juries are employed for particular and comparatively limited purposes, are scattered over the field of English procedure in too great variety to admit of enumeration here.

Juries employed for general purposes may be distinguished into petit juries and grand juries: petit juries again into common juries and special juries. Jurymen are the set of men by whom, in conjunction with the judge, to the end that execution and effect may be given to the laws, application is made of those same laws to the several individual cases which come before them. By what sort of men ought this application to be made? — By what, but by those on whose will it depends by what hands those same laws shall be made.

In any, and in what cases, ought a jury to be employed? Of the sort of body thus denominated, the main use is to apply a check to the power of the permanent judge, or body of judges: that power which, bating appeal, would, but for such a check, be arbitrary.

For whatsoever advantages are derived or derivable from this appendage, not inconsiderable is the price paid in the shape of disadvantage. Only, therefore, in case of necessity — only in proportion to the necessity, should employment be given to it.

1. Evil effect the first, complication.

2. Diminution made of responsibility at the bar of public opinion on the part of the judge.

3. At the charge of the individuals employed in this character, vexation, by reason of attendance; or, at the charge of the public or individuals, benefit in the shape of money, or some other shape to compensate for it.

4. At the charge of the suitors, increase given to delay, vexation, and expense of procedure.

In another work,* where punishment was the subject, the five cases in which the application of it was unapt, were brought to view: where it is groundless — where it is useless — where it is needless — where it is inefficacious — where it is too expensive. Where the subject is this appendage to the judgment seat, those same cases may help to serve for guidance.

Appeal out of the question, by how much soever too expensive, scarcely in any case could this appendage be justly said to be useless, needless, or inefficacious.

But let the public be a good one — as good as, by the help of such arrangements as the above, it might be made everywhere, and the road to appeal as easy as it might be made, appeal will, in the great majority of cases, suffice to render it needless: especially if into the judicatory of appeal this appendage be introduced.

Where neither party sees any such ground of complaint as affords hope of redress, appeal will not be made. Thus, for the reasons given elsewhere, it will be, in the great majority of cases — suppose in nineteen out of twenty. Place no jury-box in the judicatory below; place one in the judicatory above: here, by one appeal, you save nineteen juries.

Thus much as to non-penal causes.

With little variation, the same observations will be found to apply with equal propriety to such penal causes as receive that shape and denomination, for no other reason than the want of an individual party, to whom compensation can be made.

Cases where it is needless: —

In a case between individual and individual, if both parties are as well or better satisfied without it as with it, it is needless — it is worse than useless; the evil effects attached to it stand all uncompensated. Of the whole amount of the addition made by this appendage, to the expense of judicature, the effect is that of a tax upon justice: of this tax, at the charge of those who are unable to pay it, the effect is that of a prohibition. Of this prohibition the effect is, in the cases in question, a denial of justice.

In the great majority of non-penal suits instituted, there exists not any dispute: the need of judicature is on the part of the plaintiff; his demand is well grounded: on the part of the defendant, inability or backwardness has been the sole cause of non-compliance. By the extra expense attached to procedure, by the jury, inability is not removed or lessened, but increased: to the surmounting of whatsoever backwardness may have place, this instrument of complication affords not assistance, but obstruction.

Even where the cause of dispute, and dispute accordingly, has existence, the great majority of the number of individual cases are of the most simple nature: if the parties were present, from ten to thirty minutes would serve as effectually for discussion, as the same number of years would.

To the greater number of cases individually taken, rather than to the lesser, should the

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was of course averse to the seeing them rise to a level with the rest. An oath, called a coronation oath, framed for the manifest purpose of producing the appearance without the effect of an obligation, served him for a pretence.

* See *Rationale of Punishment*, and *Rationale of Reward*.

system of procedure be in the first instance adapted.

Causes made penal by reason of aggravation stand upon a footing widely different.

In a non-penal case between individual and individual, generally speaking, it is only by accident, and that a rare one, that the judge will stand exposed to the temptations offered by particular and sinister interest: from the magnitude of this danger, defalcation may be made by arrangements having for their object the excluding functionaries of this class from serving in districts in which they have connexions.

Not so in criminal causes.

In the most important portion of these causes, viz. that in which the alleged crime belongs to the field of constitutional law — where, in a word, the rulers as such, in addition to their share in the universal interest, possess a particular interest, — the judge who, as such, would never fail to possess (to an amount more or less considerable) interest, adds to the ostensible situation of a judge, the real character of a party, viz. on the plaintiff's side of the cause. In these cases, nothing therefore that can contribute to the establishment of a counter-force, capable of applying an effectual check to the force of this temptation, can be either needless or superfluous. The power of a jury presents the only counter-force applicable to this purpose.

In another class of cases, though the demand for a jury is not quite so strong, it is too strong to be resisted. The offences belonging to it may for this purpose be denominated offences through indigence, or the offences of the indigent; theft, fraudulent obtainment, robbery, *i. e.* forcible depredation, may serve for examples. In the suppression of offences of this class, men of all ranks have, it is true, one common interest. But in proportion as the sympathy a man feels for individuals belonging to the class in which offenders of this description are most apt to be found, is faint, the check applied by this social, to the self-regarding spring of action, is weak; and the anxiety to reach the guilty predominates over the inclination to avoid striking the innocent. The indifference with which a judge habituated to the trial of causes of this description, views the conviction and death of a defendant, guilty or innocent, might be represented by the indifference with which a butcher contemplates the slaughter of a lamb, for the carcase of which he is paid — were it not for the delight, which the judge, hating and hated by the class by which his victims areafforded, extracts from the contemplation of their misery. A citizen of London will not be at a loss for an example.*

By the same causes by which a judge will be led to regard on this occasion, with less than due sympathy, the interests of those classes which he sees lying under his feet,— by these same causes will he be led to regard with more than due sympathy those interests upon the same level with his own, or above it. In England, seeing a judge guilty, as such, of a crime of any degree, from the lowest to the highest, you are determined he shall be punished, — you must murder him, for there are no other means possible: if your wish is to see yourself punished, accuse him of it: you will not miss your mark.

Of the cases treated on the footing of criminal cases, another division which may be mentioned on this occasion, is that of the offences against the revenue. For an offence of this description, neither himself nor any particular connexion of his, will the judge be in much danger of becoming the subject of prosecution. Of the class to which he belongs, and by the sympathy with which he is engrossed, it is the interest that the mass of wealth extracted from the labour of the labouring classes be as great as possible: the greater it is, the more there is of it to enrich them, and encourage others. Rather than see one guilty individual escape, what number of innocent ones he would see suffer, it is not so easy to say.

A legislator ordaining, a judge decreeing, that whatsoever a man sells that is fit to eat, (if the individual be one whom the king delighteth to honour with his punishments,) he shall be punished and ruined for it! Would you wish to see such a government, go not to Rome under Tiberius — go not to Rome under Nero;—come to England under George IV.,—look to the Treasury under Lord Liverpool and Mr. Vansittart. For a competent ground of punishment there can be no want: coffee is among the subjects of taxation, coffee is among the eatables and drinkables taken for breakfast; and the thing sold, be it what it may, is capable of being eaten or drunk instead of it.

To that division of penal cases, which are such for want of an individual specially injured, and which, from some cause or other, have escaped the being raised to the rank of criminal ones, the above-mentioned observations will be found to apply, without any variation that will not readily enough present itself.

§ 2. *Use of jury's unanimity, causing weakness in Government.*

After all, the great and principal use of jury trial has been keeping up an all-pervading weakness in the whole frame of government.

1. The state of the English people has been, in comparison with that of other nations, to such a degree felicitous, as to have been with

* Written in 1821.—Ed.

justice styled, in the language of its rulers, the envy and admiration of the world.

2. The prosperity thus possessed has had for its cause the state and condition of the government, taken in all its parts.

3. It has had for its cause the state of the governors, with reference to their effective power over the governed.

4. But under that head it has had for its cause, not the efficiency and plenitude of that same power, but its inefficiency; not the strength of the governors as towards the governed, but their weakness.

5. It has had for its cause, not the degree in which the designs of the governors in relation to the governed have taken effect, but the degree in which they have failed of taking effect.

In England, government has had for its end in view the greatest happiness, not of the greatest number of the community, but of the comparatively few by whom have been shared among themselves the powers, and thence the sweets of government.

This state of ends in view is the result of that general habit of self-regard and self-preference which has place in the whole species, and is not merely subservient to its well-being, but necessary to its very existence.

To this rule as applied to governors (to those by whom the powers of government are exercised,) not even does the case of the Anglo-American United States afford an exception. Over the few by whom the powers of government in detail are seen to be exercised — over those in whose hands the operative branch of government is lodged, stand the many in whom is lodged the *constitutive* branch, with relation to these same possessors of the operative branch of government; the possessors of the constitutive power placing, either by an immediate or unimmediate exercise of that power, the possessors of the operative power; and the possessors of the constitutive power either of themselves constitute the greater number, or are so linked to them by community of interest, as that the interest of the greater number cannot be sacrificed by them, without the sacrifice of their own.

In this state of things, whatever in a different state of things would have been their wishes, designs, and endeavours, by the possessors of the supreme operative power never are any endeavours employed to give effect to that universally-natural and universally-prevalent self-preference; for where success is manifestly impracticable, neither endeavour nor design is likely to have place.

Of those by whom in this country, which is the envy and admiration of surrounding nations, the powers of government have been exercised, the wishes, designs, and endeavours never have been, nor can have been, any other than the wishes, designs, and endeavours of those by whom the powers of government have been exercised in these same surrounding nations.

But in England, several causes have concurred in preventing these wishes, designs, and endeavours, from having to so large an extent been carried into effect, as in these same surrounding nations.

Of these causes, the power that has been exercised by juries has been a principal, if not the principal one.

The causes appear to have been as follows:

1. The insular state of the country, whereby it has in an almost exclusive degree, ever since the Norman conquest, been preserved from hostile inroads, with the waste attending them, under which, at the hands of one another and the English, those other nations have so frequently and extensively been suffering. The division into South and North Britain, while it continued, formed to a certain degree an exception: say, in a word, *insularity*.

2. The other causes may be comprised under one general denomination — general weakness in the frame of government.

The following are the particular causes of which this general cause may be said to be composed: —

1. Jury-trial, more particularly in its application to such penal causes in which it has been the interest, real or supposed, of the monarch, and those in authority under him, that conviction should ensue.

2. A beneficial effect, and that the principal one, of the power of juries, has been the comparative inexecution and inefficiency of the design and endeavour of the other constituted authorities against the liberty of the press and public discussion.

3. The weakness infused into the general frame of government by the lawyer class, by means of the course of practice pursued by them, and rules laid down by them in prosecution of their own particular and sinister interest.

Had the measures of government had for their end in view the greatest happiness of the greatest number — had the laws and operations of government been in a uniform manner constantly directed to that end, — far from operating as a remedy to evil, all such weakness would have been itself, in the whole extent of it, an evil — an evil proportioned in its magnitude, to the importance of the parts of the law thus weakened and rendered ineffectual to those ends.

As it is, it has to a great, to a vast extent, operated as an evil: nor, in its character of a remedy to the greater evil, has its efficacy been more than partial: in particular, as to the preserving from utter destruction the liberty of the press.

But partial as the effects of this remedy have been — partial as the effects of this, together with the other causes of debility in the form of government, have been in their character of a remedy against misgovernment, — to such a degree has the whole form of government, taken together, been repugnant to the only legitimate end of government, the greatest happiness of the greatest number, that notwithstanding the partial evils produced by, and proportioned to, the general weakness in the form of government, such is its nature, that by every fresh degree of weakness introduced into it, the interest of the greatest number is served in a greater degree than it is disserved; and supposing the weakness to end in utter dissolution, the utmost quantity of evil attendant on such dissolution would not be nearly equivalent to the quantity of good, which its certain consequence, a real constitution, having for its end in view the greatest happiness of the greatest number, would produce.

Among the laws by which the greatest happiness of the greatest number has been sacrificed to the happiness, real or supposed, of the ruling one, and the sub-ruling few, are the following: —

1. All the laws which give to the persons, property, and other rights of the monarch, and his subordinate rulers, as such, any greater security than is afforded to individuals at large. As individuals, they ought to have whatever protection is necessary: as rulers, they ought not to have any more. In the Anglo-American United States, no such extra protection is afforded them: and in the Anglo-American United States, instead of being the less secure, they are the more perfectly secure. No King of England — no other man whose seat is called a throne, is so secure against hostile attacks by individuals, as the President of the Anglo-American United States is.

2. All laws having for their object any obstruction, either direct or indirect, to the free communication of opinion in relation to matters of government on the part of individuals, whether in writing or by word of mouth. In the condition of that people may be seen, and is seen, by all that can endure to see it, the fullest proof that no restraints upon any such freedom are necessary to the maintenance of the most profound tranquillity, under a government in which the greatest happiness of the greatest number is the object really pursued. In that same example may also be seen another proof, that of all such restraints, the effect is not to cause tranquillity, union, good-will, or any other such moral instrument of felicity, but to disturb it.

Under this description come all laws against treason, and sedition — all laws against the application of the press to the purpose of indicating grievances in the government, and proposing remedies to those grievances, or to the purpose of holding up to view misconduct in any shape, on the part of any persons concerned in the exercise of the powers of government — any public functionaries, considered as such. And under the name of laws must be included all sham or spurious laws, as well as genuine ones: meaning by sham or spurious laws, the laws, as they are called, made under the name of *rules* of law, by judges, on pretence of declaring what is law; for the genuine and the spurious are so mutually interwoven, that to separate them is impossible.

Of the laws and rules of law made against the liberty of the press, the object and endeavour has been to secure not only impunity, but non-divulgation, to all misdeeds committed on the part of any of the persons concerned in the exercise of the powers of government — of the public trustees of every class — to the prejudice of those for whom, for form's sake, they every now and then acknowledge themselves to be in trust. Laying down such a rule, was doing much farther towards the establishment of a complete despotism, than was done by those who, in Hampden's case, sought to invest the king alone with the unlimited power of taxation, and had much less excuse for it in precedent. It was in effect an open avowal of misrule in all its branches — a declaration of war on the part of all those who bear a part in the exercise of the powers of government, against all those on whom, and at whose expense, those powers are exercised — a declaration of war by all rulers against all subjects.

Had it been carried into effect, by no imaginable particular act of oppression or depredation on the part of rulers, could resistance, rebellion, deposition on the part of subjects, have been more completely justified: for by it, the design and determination to persevere, and for ever, in every such tyrannical course, was openly professed. Had it been with any consistency carried into effect, such would have been the result: and it would of course have been carried into effect, had it not been for the power still remaining in the hands of juries.

In England, any such notion as that of suffering a judge to treat as guilty an individual who, in the opinion of a jury, had been declared not guilty, would be intolerable; — scarcely would the highest paid, and most determined confederate, or instrument of despotism, venture to accede to it: indeed, supposing it to apply to libel law, or, in a word, to any offences in regard to which the influential members of the government took any interest, juries might as well be discarded altogether. But countries are not wanting, in which an arrangement of this sort might be attended with preponderant advantage: for

countries are not wanting, in which the admission of juries, with powers equal to those possessed, howsoever exercised or left unexercised by English juries, would be incompatible with the existence to any good effect of penal, not to say of non-penal laws.

Suppose the exercise of this power on the part of the judge limited to the cases in which, in the event of ungrounded punishment, the injury done by it will not be irreparable; the injury done by it would be as nothing, in comparison of the mischief that would be done, either by an unchecked jury, or an unchecked judge. To any misuse of this power on the part of the judge, checks of no inefficient nature would be applied by an adequate recordation of the evidence, and regular reports of all such cases, made to the central authority in the seat of supreme judicature: still more, if the importance of the case warranted any such expense as that of printing and publishing the evidence in the district in which the cause has been thus decided.

§ 3. *In what causes shall a jury be employed.*

In no civil cause, in the first instance.

In every civil cause, in the way of appeal.

In all penal causes in which reputation is affected; viz. that class which in French law used to go by the name of *grand penal*. In general, not in the first instance in penal causes, by which reputation is not affected; viz. in that class which used to go by the name of *petit pénal*. But in all these in the way of appeal.

In English law, (with the exception of those causes of which the sort of judicatory styled a court of equity takes cognizance, and those of which, by local statutes, cognizance is given to the small-debt courts, and a few of a miscellaneous nature, of which cognizance is given to justices of the peace acting singly, or in petit sessions, or in general sessions,) every cause goes in the first instance to a judicatory with a jury in it; also in the second instance, if the great four-seated judicatory, out of which the cause was sent to the compound judicatory composed of one of the twelve judges with a jury, have thought fit to give leave.

Of the causes which are thus brought before a jury in the first instance — in the far greater number, justice is outrageously violated by the course thus taken — outrageously violated, and of course for the benefit of the class by which the violation has been established.

In by far the greater number of causes, there is nothing for the jury to do; in fact, there is no dispute. The litigation has for its cause no other than, on the part of the defendant, either inability or unwillingness to do what he is by law bound to do, and thus required to do; viz. in most cases, pay a sum of money.

Wherever inability is the cause, whatever is the degree of insufficiency antecedently to the commencement of the cause, that degree is deplorably heightened by the progress of it. By the defendant, delay is purchased — purchased at a usurious interest; and the hands by which the interest-money is received and pocketed are — instead of those of the injured plaintiff, those of the lawyer, and those of the man of finance: enormous taxes having been imposed on such chance as an injured man was obliged to purchase in the lottery of what is called justice. If the price so paid for delay, were paid in the shape of interest on the money due, the quantum of it would run in proportion to the amount of the money due: it would be proportioned to the advantage gained to the defendant by the non-payment, and to the disadvantage suffered by the plaintiff from that same cause. As it is, it bears no proportion to either standard: it is the same, whether the principal money due be 40s. or £40,000.

Of another class of cases that are brought before a jury, cognizance by a jury is not possible: the impossibility has for its cause, the time necessary for the statement and discussion of the case. In the most ordinary species of cause, the statement and discussion by advocates on both sides, the charge given by the judge, and the consideration bestowed by the jury, occupy a considerably less quantity of time, than that during which twelve men can continue sitting together without inconvenience. But there are some causes, the hearing of which in this mode could not be completed in many times that portion of time. Various are the sorts of causes thus circumstanced. The most commonly occurring sort, and those which are most readily conceived to be in this predicament, are causes of account. The attorney, and the advocate or counsel, as he is called, by whose advice a case of this sort is brought before a jury, knows full well, that by the jury, when it comes before them, nothing will or can be done in it. When the jury is sitting, with the judge on the bench above them for their direction, a discovery is pretended to be made, that in that way it cannot receive a decision. The advocates on both sides having laid their heads together, the discovery is announced to the judge—to the judge, whom long experience has prepared for the receipt of such discoveries. Then comes the necessary resource — sending the cause off to arbitration: arbitrators are then appointed, who are almost always some of the advocates themselves, or their connexions. An advocate on each side, or one chosen on both sides, now takes cognizance of the cause. The payment he receives being proportioned to the number of his sittings, he takes care that the time of each sitting

shall not be too great, nor the number of the sittings too small.

The cause may be simple — at the utmost point of simplicity; and in this case happily are by far the greatest number of causes. It may be complex to the utmost pitch of complexity; and in this case are unhappily not a few. In the former case, the delay created, and expense bestowed on jury-trial, is the whole of it a waste. Simple or complex, under the English system, one jury is allotted to every cause, and to no cause more than one. Were the parties heard in presence of each other at the outset, nine-tenths would be disposed of in as many half-hours; and of the remainder there would be some in which would appear at the first hearing, from one to half-a-dozen or more points, capable of constituting each of them matter for a separate jury-trial, and capable upon occasion of being distributed, for dispatch sake, amongst as many juries.

§ 4. *Effects advantageous and disadvantageous.*

Direct and indirect: — of the effects of jury-trial, this may serve for the first division.

By the direct effects, I mean those which flow in an immediate way from the causing the decision to be given by a jury, — instead of its being pronounced by a judge or set of judges, — and that are produced independently of any influence exercised by this circumstance on the conduct and character of the judge.

Consider in the first place the effects of the first order; viz. the influence exercised by this circumstance on the rectitude of the decision pronounced in each individual cause, considered without reference to other causes, and without reference to the feelings of any persons other than those of the parties to the cause, and their particular connexions.

Supposing that, on the part of the judge, adequate moral aptitude be to be depended upon, no advantage — no superior probability of rectitude of decision, could reasonably be expected, from the substitution of this ever-changing judicatory, to a permanent one. Neither in respect of intellectual appropriate aptitude, and more particularly appropriate information, nor in respect of appropriate active talent, could a company of men, taken promiscuously from the body of the people, and charged, perhaps for the first time, with the function, for the apt discharge of which such close attention, coupled with so much discernment, is incidentally necessary, — be reasonably regarded as equal, much less as superior, to a man in whose instance the business of judicature has been the subject of the study, and for a time more or less considerable, of the practice of his life. But in every as yet known system of judicature, into which jury-trial has not been admitted, appropriate moral aptitude has been upon so bad a footing, that the comparatively greater moral aptitude, which has in practice been given to juries, has more than compensated for whatever deficiency has had place in their instance, in the article of intellectual aptitude, and that of active talent.

As no cause is ever submitted to a jury but in connexion with a judge, to whose instruction they are, by the force of known usage and public opinion, predisposed to have regard, the appropriate information of the judge, whatever it be, is customarily at their command; and it is only by some particular and not customary direction given by them, with or without reason, to their will, that this supplement to their own inbred intellectual aptitude can fail to be turned to use: and where moral aptitude fails, insomuch as the judge is disposed by any cause to decide in a manner contrary to that which, in his eyes, is justice, the probability of rectitude of decision is, instead of being increased by superiority in appropriate intellectual aptitude or active talent, proportionably decreased.

Note, at the same time, that means exist whereby moral aptitude on the part of the judge may be placed on a much firmer footing than it has ever been as yet, and at the same time be made to receive increase.

One point there is, in respect of which, on the part of the judge, if jury-trial be not employed, appropriate moral aptitude never can with any sufficient ground of assurance be depended upon. This is freedom of bias, whether on the score of pecuniary or other interest, or on that of sympathy or antipathy produced by party affections, or propinquity, or remoteness in respect of rank.

Now as to the effects of the second order. By these I understand, the effects produced by the decision, in the cause in question, on the minds of the several persons within whose cognizance the case in question, in the state in which it presented itself to the judicatory, may happen to come. In this class of effects will be seen to lie the chief and most incontestable of the advantages attendant on the compound judicatory thus constituted.

In the case of misdecision, this class of bad effects consists of danger and alarm — danger of misdecision in future suits, from the influence of the same cause, whatever it be by which misdecision in the past cause was produced — alarm produced by the contemplation of this danger.

In the whole of the judicial establishment, suppose but a single judicatory: for simplicity of conception, call it that of a single judge, habitually exposed to misdecision — for example, by the most natural and common of the causes by which such disposition is liable

to be produced; viz. by love of money. In such case, the place of general security is occupied by general alarm. No man, who either by poverty, or probity, or consciousness of want of skill to perform with success the process of corruption, regards himself as able to defend himself against a competitor who to the disposition adds the ability to practise corruption; nor can he avoid regarding his property as being in a state of perpetual insecurity. Even he who, to the ability adds the disposition to give a bribe, cannot but regard himself as placed in a correspondent state of insecurity with respect to such part of his property as would be eventually necessary to compose the bribe. Even suppose corruption in a pecuniary state effectually guarded against, still there remain favourable partiality on the score of sympathy, unfavourable partiality on the score of antipathy, as towards individuals individually taken, or as towards all the individuals in general, of whom is composed a party in the state.

See now how the matter stands in regard to the effects of the second order. In the cause in question, misdecision suppose has had place; a wrong verdict, a verdict generally regarded as wrong, has been pronounced. On the feelings of the public at large — of that part of it by whom cognizance has been taken of the cause — what are the evil consequences? Answer, none: Danger, none: Alarm, none. That jury has judged wrong; but that jury is no more. True it is, that by the same causes by which misdecision has been produced in the instance of that jury, the like effect may, for aught anybody can say, be produced in the instance of any other juries. True this, and what nobody can deny. Still, however, neither the alarm, nor even the danger, is in this case anything considerable, in comparison of misdecision on the part of a judge, when produced by any permanent, extensively operating, and well-known mental cause. In nine cases out of ten, perhaps nineteen cases out of twenty, on the part of the jury misdecision will not have place; for in some such proportion are the causes which (being defended through inability to do what should be done, or through perverseness) do not admit of doubt; and in causes in any proportion, evil disposition as above might produce misdecision in the case of an unchecked judge. But be the danger ever so small, the alarm will be still smaller. To this difference contribute several causes: — 1. The general prepossession in favour of this mode of trial; and, 2. The confidence which, setting aside the causes of mistrust, men naturally have in their own good fortune.

English law may furnish a familiar example. Prosecutions for alleged libels, and other offences against government, frequent: verdicts, some for the prosecutor, the government; some against it, for the defendant. Now suppose these causes, all of them, tried by any judicatory of four of the twelve judges, or by any one judge of any such judicatory, and in both cases without a jury, — who is there of any party, by whom, antecedently to trial, any the least doubt could be entertained but that a decision affirmative of the guilt of the defendant would be the result?

Another division, in which the effects of this institution may be considered, is the following: —

I. Applying itself to the situation of the judge, it has a strong and incontestable tendency to give increase to his appropriate official aptitude, considered in all its branches.

1. To his moral aptitude it gives increase, by the obligation it imposes upon him, of giving, with reference to justice, the best appearance possible to everything which, on the occasion in question, he does or says. In so far as upon the effect of what he does or says depends the decision given by the jury — only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce. Take away the jury, the judge does exactly what he pleases: if he pleases, he says whatever he pleases, and as little of it as he pleases. If so be that, in the individual cause in question, he is bent upon injustice — if in support of the decision which he is determined to pronounce he can find anything to say which in his eyes is plausible, he will, if he thinks it worth while, say as much accordingly: if he be unable to find anything that is thus plausible, or the trouble of doing so is in his eyes too great, he will say nothing at all, and his will will not the less be done.

2. Appropriate intellectual aptitude, including appropriate professional information.

In this particular, the salutary influence of the necessary presence of the jury, and the demand it may be continually creating for appropriate discourse delivered by him to them in the presence of a company of spectators, contributes in a powerful and incontestable manner to secure the interests of justice — at any rate, against inaptitude in any manifest or flagrant degree, in respect of this branch of appropriate aptitude.

3. Appropriate active talent. Without any considerable difference, the above observations apply to this branch likewise of appropriate aptitude.

Set aside the institution of a jury, the most complete corruption may be united with more than ordinary intellectual weakness and ignorance, and more than ordinary deficiency in respect of faculty of expression, and still the man be not incapable of giving effect to his will in the situation of a judge. For his decision, be it what it may, expression must

be found. But when that is done, all is done that is necessary for him to do: the least said, says the proverb, is soonest mended.

II. General effect on the minds of men in the character of jurymen.

The effects of the institution on the minds of the men to whom it happens to find themselves in a state of exercise in the situation in question, are not less salutary nor less incontestable. Every judicatory of which a jury forms a part, is a school of justice: without the name, it is so in effect. In it, the part of master is performed by the judge; the part of the scholars by the jurymen; and what takes place, takes place in a company more or less numerous of spectators. The representation there given is given by a variety of actors, appearing in so many different parts. There are, at any rate (or at least there ought to be, where no bar is set by special and preponderate inconvenience,) the parties on both sides: on one or both sides there are commonly witnesses: there are but too commonly professional lawyers, in the character of advocates; and there are, still more too commonly, others in the character of attorneys. By the various parts in which these actors in the judicial drama appear, and by the various casts of character exhibited by different individuals in each part, affections of all sorts in the breasts of jurymen are excited, and the attention fixed; and the reasoning faculty, with matter infinite in variety for it to operate upon, is continually called forth into exercise.

The inconvenience which, in the shape of labour and corresponding expense to the individual jurymen, if uncompensated, or to the public purse if they are compensated, constitutes a drawback which there will be occasion to speak of in another place. Against that loss on this score, will be to be set the profit on the above score — and that, it may be seen, is no inconsiderable one.

These benefits, it may be seen, may be attained, if not in a perfectly equal degree, not very sensibly less than equal, so as a verdict be but given by the jury, whether that verdict be or be not binding upon the judge.

Of the good effects actually produced by jury-trial in particular causes, over and above its general and more extensive influences as above explained, much will depend upon the state of the law. In proportion as the law is clear, the power given to the jury in form, will be exercised by it with effect; the verdict given by the jury will be the expression of their will, acting under the guidance of their understanding. In proportion as the law is otherwise than clear, the verdict given in form by the jury will in effect be the decision of the judge; it will be the expression of his will, in the giving effect to which his understanding, such as it is, and his active talent, such as it is, assisted by such appropriate professional information as it has happened to him to lay in a stock of, will have been employed. Thus it is, that under an all-comprehensive code, especially if accompanied with an apt Rationale, a jury will be quite a different sort of instrument from what it is under the generally prevalent mixture (composed in indeterminate and ever-varying proportions) of statute-law and common-law, — that is, of really existing law, and that counterfeit species of law which has been imagined and framed on each individual occasion by the judge in question, and his predecessors.

The branch of law, with relation to which the usefulness of jury-trial to the greatest happiness of the greatest number is most conspicuous and most unquestionable, is the penal branch. The feature by means of which it is productive of this beneficial effect, is the universal concurrence, so erroneously termed *unanimity*.

The effect by means of which it is productive of this benefit, is by infusing a general weakness into the powers of government: into the powers of government taken in the aggregate, but more especially when considered in relation to the people.

In England, the sacrifice made of the greatest happiness of the greatest number, to the happiness, real or supposed, of the monarch, has been less in proportion than in any of the monarchies of the continent of Europe. Of this difference, whatever it may be, the cause will upon examination be found to be in the weakness of the government as towards the people. In England, several causes have concurred in the keeping up of this weakness As to those other causes, they are beside the present purpose. The only one that belongs to it, is the weakness, in so far as produced by jury-trial, with its unanimity in penal causes.

Had it not been for this weakness, the condition of Austria would at this moment have been the condition of England. George the Fourth would have been in England, what he is in Hanover: in the one country, as in the other, the people equally poor, and equally miserable. From what he is in one country, may be seen what he would be in the other.

The benefit produced by jury-trial with its unanimity, is produced by striking the laws every now and then with impotence. The law is the work of the king: and in the production of the work he has two instruments — the houses of parliament taken together, and the supreme judges.

The houses of parliament make law in one way: the judges make what they call law, and what has the effect of law, in another way.

The law, by whomsoever made, — being made, not for the benefit of the greatest happiness of the greatest number, but for the

benefit of those by whom it is so made, — is made of course principally for the benefit of the king, in which way soever made.

By whatsoever laws, by the good, or supposed good, done to the king, evil to a greater amount is done to the greatest number, — it is for the good of the greatest number that those laws should remain in the greatest possible degree unexecuted and inefficient. Of the laws which havethis effect, so great is the extent, that rather than the effect of those laws should not be weakened, it is for the benefit of the greatest number that the effect of the whole body of law taken together should be weakened.

In England, the superior judges, — more particularly those of the King's Bench, are in possession and exercise of a power, the exercise of which is of itself sufficient to the establishment of the most tyrannical despotism. They take a word or a phrase, and in the use they make of that phrase they find a pretence, and that an unquestionable one, for inflicting punishment without stint, on any person they please, for any act they please.

The phrase *contra bonos mores*, Latin as it is, serves them for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain concerning morality.

The phrase, *Christianity is part and parcel of the law of the land*, serves thus for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain, concerning Christianity.

The word *conspiracy* serves them for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain, concerning the act in question.

It is not true, it may be said, that any such despotism is in their power; for above them sits parliament; above them also in parliament, a king who can do no wrong, nor would suffer wrong in any such shape to be done. For, not to mention the wrong which in this case would be done to subjects, a despotism thus established would be established in contempt of the authority of parliament.

Yes: thus much is sure enough; namely, that without the consent at least, not to speak of anything more than consent, of the man who can do no wrong, no wrong in this shape can be done. But in this shape, and by such instruments, by the man who can do no wrong, wrong to any amount can be done, in a manner at once more effectual, and in a variety of ways more commodious, than by any such an unwieldy instrument as that called parliament.

He can do no wrong, because wrong becomes right by his doing it. As the God which is in heaven can commit no sin; so the God which is upon earth — the God of Blackstone's creation and of all men's worship, can do no wrong.

The beneficial effects of jury-trial are produced in a different shape, in the civil branch and in the penal. In the civil branch, it is by applying a bridle to arbitrary power in the hand of the judge: in the penal branch, as we have seen, contributing to infuse weakness into the body of the law.

Under governments in which the institution of a jury has no place, the judges not being in those countries, removable, either immediately or unimmediately, by the power of the people, a man who upon any account sees an adversary in the person of the judge, may behold in that functionary a tyrant, from whose power (which may be sufficient to effect his ruin) he sees no possibility of escape. From a situation thus distressing, the institution of a jury affords relief. Suppose a man to have suffered on one occasion — suppose a man to have suffered from enmity in the breast of one or more of the jurymen, no such sensation as that of inevitable oppression presses upon him: what he has an assurance of is, that a jury composed of exactly the same individuals will not have to try him on any other occasion; what he may at the least have the hope of is, that on a jury sitting on another occasion, the same adversary or adversaries will not have place.

In the penal branch, the like good effect is produced in the same way; but in the penal branch, to that good effect, another, and still more important, is added. In the penal branch, the institution of a jury contributes, in conjunction with other causes, to the production of that weakness in the law, to which this country — which in this case is looked to as a pattern, and from which all conceptions on the subject of jury and jury-trial are taken — is mostly indebted for those liberties, by which it is distinguished from other countries. It is from the circumstance of unanimity that the effect is produced. By a single individual out of twelve, the hand of the law is capable of being paralysed.

In consequence of this unanimity, *i. e.* in consequence of its necessity to conviction, it is in the power of any one man, by surmounting the patience of the rest, to command the verdict, and thereby, be the law and the fact ever so clear in the condemnation of the defendant, to produce his acquittal.

In this false declaration of unanimity may be seen the cause of almost the whole of the afflictive confinement which at present has place in the case of juries. The unanimity out of the question, the verdict would be decided by votes; and in the ordinary state of things

the voting would take place immediately upon the delivery of the charge by the judge. In two cases alone would any delay in the delivery of the verdict have place: — 1. If in the instance of this or that juryman, a desire were expressed of receiving instruction from any other. 2. If by this or that juryman, a desire were expressed of communicating instruction to this or that other, or to the rest.

§ 5. *Proposed unimpowered jury, its uses and regulations.*

The only circumstance in which the species of jury here proposed differs from the jury in use is this: — viz. that whereas the decision pronounced by the actual jury is — bating some special and assigned cause of nullity — binding upon the judge, the decision of the proposed unimpowered jury is, as the denomination here given to it imports, not binding upon the judge.

In general terms, the use of the unimpowered jury consists in this: — viz. in its capacity of being introduced into any country in which the state of society is regarded as not being sufficiently advanced to render it conducive upon the whole to the purposes of justice, to vest any such power in the great body of the people.

A country may be supposed, in which, though the great body of the people are not in so advanced a state as to render it eligible to repose this power in their hands, yet this may not be the case with a certain distinguished portion of the people, who on this occasion may be distinguished by the appellation of the higher orders. Admitting the existence of such a distinction, it may be a question whether it might not be more conducive to the greatest happiness of the greatest number to attach to the judicatory an unimpowered jury, composed altogether of the lower orders, than an ordinarily impowered jury composed exclusively of the higher orders, or conjunctly of the higher and lower orders.

But to take the more simple case in which, without distinction of orders, the supposition is that the state of society is not such as to admit of an impowered jury, of whatsoever materials composed.

In this case, without any the least prejudice to justice, the advantages belonging to an impowered jury may to a considerable degree be given to, or rather would of course have place in the case of, this sort of unimpowered jury.

1. In the first place, there would in this case, as in the other, be the same sort of aid to, and security for, the appropriate aptitude, intellectual as well as moral, on the part of the judge.

2. In this case, as in the other, the people would, in every judicatory to which this appendage were attached, behold a school of justice.

Regulations in the case of an unimpowered jury: —

1. The question will be to be reduced to a single alternative: an option to be made between two mutually contradictory propositions: Examples, guilty or not guilty? for the plaintiff or for the defendant?

2. The number of persons in the jury, odd, viz. that in every instance a majority may have place.

3. Mode of voting, secret, otherwise termed by ballot.

4. On hearing the decision, the judge does in regard to it as he thinks proper: he either reverses, or confirms it with the exception of such alterations as he thinks fit.

5. In the books of the judicatory entry is in each instance made of the verdict pronounced, and of the course taken by the judge in relation to it as above.

By comparison of different periods, the advance made in the state of the public mind may be ascertained. The smaller the proportion of the cases in which the verdict is reversed or altered, to those of the cases in which it stands unchanged, the greater the progress made by jurymen in the character of scholars in this school of justice.

Not in the lowest stage of society, actual or possible, can any conceivable mischief be produced, by the intervention of a popular judicatory thus destitute of all power of doing mischief; and sooner or later, by this institution alone, would the state of society be raised from the lowest level to the highest. By way of encouragement, that the men thus placed in a sort of judicial situation may be impressed with a sense of their own dignity, and their functions be an object of desire and source of satisfaction rather than aversion, a station somewhat elevated and ornamented should be assigned to them, with something of a decoration to be worn about their persons.

§ 6. *Jurymen who? What persons should be capable of serving as jurymen.*

Answer: Generally speaking, under a system of universal or virtually universal suffrage, as under the most popular of the American United States, take for the general rule all persons of the male sex who are of full age and are able to read. For the mode of ascertaining the reading qualification in the most commodious manner, see Bentham's Radical Reform Bill.

In that case no exceptions were needful. Why? Because the aggregate number of all the persons of different descriptions, against whose admission any valid objection could be raised, was in that case not considerable enough to produce any well-grounded apprehension of their exercising an unfavourable

influence on the result; and because, each person delivering his vote separately, no person would be exposed to experience annoyance in any shape from any other. Delivering a vote in an election requires nothing but a will: an understanding? yes, this likewise; but an understanding which always can, and without impropriety may, have taken another understanding for its guidance.

Not so in the case of a jury: each man's understanding is, by the incident of the moment, and in a state not prepared for the occasion, called into exercise. It may, it is true, take another understanding for its guidance, but ere it can have made choice of any such directing understanding, it must itself have been put in exercise.

In the case of the election, the influence of any one vote on the result cannot be otherwise than extremely small. In the case of the jury-trial, where, as in Scotland, unanimity is not necessary, a single vote may suffice to determine the result.

In the case of the election, each voter appearing upon the spot and delivering his vote separately, no one individual is exposed to annoyance at the hands of any other. In the case of the jury, it being necessary that they should sit all of them in company of each other, it may happen, that by a single individual in whom the capacity of producing annoyance in this or that shape, with or without the inclination, has place, annoyance may be produced in such shape and degree as may suffice to give disturbance to the whole operation: in such sort that misdecision, or more naturally non-decision, is produced, not to speak of the discomfort produced at the same time to the individuals.

With what degree of frequency is it desirable that within a given length of time the function of a juryman should by the same individual be exercised?

There are considerations which operate in extension of the time; others which operate in limitation of it.

As to the direct and particular use of the institution, the more frequently this function comes to be performed, the more experience the individual gains, and the more fitted he is thereby rendered for it.

Under the head of uncompensated labour, which is as much as to say expense, — the greater is the hardship, the heavier is the tax which is in this case imposed.

Another inconvenience is, that, in proportion to this frequency, the condition of the juryman is made to approach that of the permanent and official judge, and thereby the inconveniences attached to such permanence are brought into existence.

When considered in the capacity of scholars in the school of justice, the more frequently those who have been entered into this school are exercised, the greater will their proficiency be: then, on the other hand, the more frequent the exercise given to those who are thus entered, the smaller is the number of the members of the community to whom, in this character, the instruction is imparted.

The two evils, the exclusion of which is on this occasion to be avoided, are — the punishment of non-offenders, and the non-punishment of offenders.

I. Against the punishment of non-offenders, the following are the modifications that present themselves: —

1. Necessity of unanimity to warrant conviction and punishment.

2. In case of dissentience, necessity of a majority. This majority is in its extent absolute and relative; susceptible of degrees, of which the highest is *that* in which the minority consists of no more than one; and the lowest, *that* in which the majority exceeds the minority by no more than one.

To contribute to the effect desired, it is not necessary that the want of unanimity, or of that extra-majority which is thought fit to be required, should have for its effect acquittal, and the consequent exemption of the accused from all punishment. Its effect is capable of being limited, to the giving him exemption from the highest degree of punishment, or from the highest and the next to the highest, and so downwards, in the scale of punishment.

Of this modification the usefulness is more particularly conspicuous and undeniable as applied to irremediable punishment, and in particular to that mode of punishment which alone is completely and absolutely irremediable, viz. mortal punishment.

Note, that the greater the absolute number, *i. e.* the total number of those of whom the jury is composed, the greater is the greatest relative number of which the ultra-majority is capable of being composed.

II. Non-punishment of offenders.

From the giving to a single acquitting voice, or any other such small number of acquitting voices, the effect of producing total or partial exemption from the appointed punishment, follows inconvenience; that is to say, danger of non-punishment of offenders.

The case of corruption is the one most easily provided against; at any rate, that corruption, to the application of which no antecedent intercourse or particular connexion is necessary.

The following are the arrangements by which, in correspondent proportion, the difficulty that attaches upon the application of the corruptive influence may be increased.

1. Increasing the number of the minority necessary to overrule the opinion and will of the majority.

2. Subjecting the choice of the jurymen on

each occasion to the power of chance, and at the same time giving to the interval between the election thus made, and the delivery of the verdict, the shortest duration possible.

Not slight is the grievance produced by so large a number as twelve, so inexorably required in all cases. For the correction of it, we need no other instruction than that which is afforded by the instances in which superior power is lodged in less trustworthy hands.

True it is, that there have been twelve apostles. Before them, there were twelve months in the year, twelve divinities of the highest class, and twelve divinities of the next highest class. Since then, there have been twelve Knights of the Round Table of King Arthur.

In the case of jurymen, as of all other functionaries, the problem is, how to secure on their part, with reference to their function, the maximum of the aggregate appropriate aptitude.

In this instance as in others, elements of appropriate aptitude, three, —viz. appropriate moral aptitude, appropriate intellectual aptitude, and appropriate active talent: branches of appropriate intellectual aptitude, two, — viz. appropriate knowledge, and appropriate judgment.

Of these elements, the first in the order of consideration, and as it should seem of importance, is appropriate moral aptitude. But for no one of these three elements, can any proper provision be made, without consideration had at the same time of the other two.

As to appropriate moral aptitude. For securing this quality, reference must be made to the causes of relative inaptitude. For securing aptitude, the course to be taken will be, to counteract the influence of these sinister causes.

For applying the proper remedy against delinquency, the first thing to be done is to bring to view the source of the correspondent temptation.

This will be, on questions between individual and individual, partiality in favour of either side to the prejudice of the other: on a question between individual and government, partiality in favour of either side to the prejudice of the other.

As to this matter, partiality in favour of the individual, to the prejudice of the constituted authorities as such, is of course in any individual instance possible. But what is beyond comparison more probable is, partiality in favour of government, to the prejudice of the individual; so much more ample and securely efficient are the means of rewarding, and thus procuring partiality, in the hands of government, in comparison with the most efficient means that can be generally employed by individuals.

Widely different, in respect of the amplitude of the source and probable degree of efficiency, is the temptation in favour of any individual, compared with the temptation in favour of government, which is, in respect of quantity, practically speaking, infinite; and in respect of constancy, applying itself in every case in which, avowedly or unavowedly, government has any concern.

In favour of an individual, it is only in a comparatively small number of cases that partiality can find means to operate with any chance of success.

On this side, partiality will require to be distinguished into natural and factitious.

For examples of natural partiality, take the following: —

1. The jurymen having a natural, though more or less remote and undefined, and thence an unseen, interest, in a pecuniary or other shape, in the event of the cause.

2. Jurymen, in this or that proportion of the whole number, having connexion in the way of interest, or sympathy, with a party on either side of the cause.

3. So a feeling of hostility in the way of antipathy.

Now as to temptations in a factitious shape, those of a pecuniary nature are at once the most obvious and the most extensively applicable. The act by which temptation of this nature is applied, and applied with success, is, if it be in a pecuniary and tangible shape, termed bribery; or if in a less tangible shape, corruption; though even in any case in which the word bribery is employed with propriety, so may the word corruption: corruption being the genus, bribery one species of it.

Much more difficult to contend with is the case where the source of the temptation is natural, than where it is factitious. Where it is factitious, you may by means of dispatch prevent the application of the instrument of temptation: where it is natural, the instrument of temptation is already applying itself in all its force.

§ 7. *Jury appointment.*

By whom should the members of a jury be appointed?

Answer: By no man, but by fortune. Man has sinister interests; fortune has no sinister interests. Under man's appointment, justice would have no even chance; under fortune's appointment, she will have an even chance, and that is the best chance that can be given to her.

Whatever benefit has resulted from this appendage to the judgment seat, has been produced by its applying as a bridle to arbitrary power, in the hands of the judge, and those in whose particular and sinister interests he is a sharer. From a bridle, his endeavour has of course from first to last been, to con-

vert it into a cloak, and thereby into an instrument.

The individuals who, on the occasion of each cause, serve in this character are, or at any rate are supposed to be, a minor assemblage, a comparatively minute body, taken out of a comparatively large class. In each instance, therefore, the composition of the jury depends upon two distinguishable circumstances: 1. Upon the situation in life of the individuals composing the class out of which the selection is made; 2. On the situation of the hand or hands by which the selection is made.

In so far as the appointment, by which, in the individual cause in question, the members of the jury are determined, is regarded as having for its cause, avowed or concealed, the will of this or that person, whose will could not, consistently with the acknowledged design of the institution, be thus employed, — the operation, by which effect is given to such will, is called packing.

The class out of which the selection is made, suppose it, in the whole or in the greatest part, composed of individuals whose place is among the ruling few, — or whose eyes, with a view to the advancement of their interests, are habitually fixed upon the ruling few: packing is thus far established, and established by law. Suppose the form of government an aristocracy: here we have a system of packing for the purpose of aristocratical sinister interest.

Suppose the form of government a monarchy, with an aristocracy under it, with or without a colour or shade of democracy: here we have a system of packing established for the purpose of a combination of monarchical and aristocratical influence.

Suppose the composition of the class out of which the selection is made, in a certain degree mixed — some of the individuals, sharers in the particular and sinister interests, others not: in this case it is, and in this alone, that it may be matter of importance what the hands are by which the selection is made. If these be the hands of an individual or individuals belonging to the tainted class just mentioned, as well might the jury be composed exclusively of such hands without any mixture.

From the above considerations result two practical conclusions: —

The body out of which juries are respectively selected should be either —

1. Of the individuals possessing the right of suffrage * in the election of members of the representative assembly under the system of virtual universality of suffrage, — all such whose residence is within the judicial district in question; with the exception of a few classes, such as insane persons, criminal convicts, &c., whose interference, though without effect in that case, would not be without effect in this; — or,

2. A select body, thence not so numerous as that all-comprehensive body, but still amply numerous in comparison of the number of the jurymen, who for the purpose of one or more causes are appointed for one and the same day's service: the body of electors by which this election is performed, the same as that just described.

In either case, fortune's will be the most proper hands by which, for the purpose of each individual cause, the selection can be made.

Fortune is not exposed to the action of sinister interests, of interest-begotten prejudices, or authority-begotten prejudices: every human being is. If the design had really been to prevent the selection of the jury from being rendered partial, and conducive to misdecision, by the influence of those causes, it is to fortune, and not to any human being, that the selection would have been committed. Throughout the whole of the system of which jury-trial is a part, two objects — two intimately connected objects, have been aimed at, in so far as circumstances have admitted, by the workmen employed in the fabrication of the system, viz. the lawyers, — and the kings, whose dependent creatures and instruments they always were; — viz. to secure the real existence and efficiency of partiality in their favour, and to secure the appearance of impartiality. When a man is to make this selection, scarcely in one instance out of twenty will partiality be really without a place in this selector's mind: scarcely in one instance out of twenty, be the partiality ever so strenuous, will there be any outward and visible sign of it. Look over the table of "Springs of Human Action." † That table now lies before me: sixteen is the number of different ones you may see, no one of them less capable of determining and misleading conduct than another: sixteen different sorts of interests, every one of them capable of acting with effect in the character of a sinister interest: sixteen, of which the love of money is but one. In all times, and with the exception of the metropolis, in all places, the sheriffs have been the absolutely depending creatures of the king, placed by the king, engaged in pecuniary accounts with the king, and for the difference between profit and utter ruin, depending on the uncontroulable will and pleasure of another set of dependent creatures and instruments of the king — the barons of his exchequer, judges of the great judicatory of accounts between him and his defenceless subjects.

The judges were placed and displaceable by the king. The sheriffs were placed by the

* Viz. in the primary assembly, that is to say, where, as under the French and Spanish constitutions, there are assemblies constituting stages of election more than one.

† See Vol. I. of this collection.

king; and at the end of each year, each one of them of course gave place to another, placed in like manner by the king. The jurymen were placed by this creature of the king; and at the end of each short length of time — call it term, call it assize, call it sessions—gave place to another set, selected by the same or another hand, in that same place. In this state of things, wherever the king or any individual dependent on him possessed, in any shape, an interest in the cause, think what would have been the real efficiency of any measures having for their professed object the securing of impartiality in the administration of justice.

By the combination of the two modes of appointment above mentioned, the useful purpose of the institution might in a certain respect be forwarded. Of the jury in each cause, the greater number might be taken by lot out of the all-comprehensive body of electors: one, or some other such small number, out of the select body. What is here assumed is, that it is with a view to superiority in intellectual aptitude and active talent, that the selection is to be made.

Here, then, by the major portion in whom, in respect of appropriate moral aptitude, the reliance is, — obsequiousness or resistance to the guidance of the select few will be manifested, according to what, in their eyes, are the dictates of justice.

The right of expunction, shall it be allowed to the parties?

The room for the exercise of it will depend on the number selected in the first instance.

To any approach towards a satisfactory solution of this question, much more detail would be necessary than the present design could afford.

Serious objection, however, is not altogether wanting. To the party in the wrong, supposing him conscious of his being so, an advantage having place to an extent to which no limits can be assigned, is thus given. Proportioned to the reputation for appropriate aptitude, in all its several elements, possessed by the eventual juror, will be the eagerness of this self-condemned party to put an exclusion upon so assured an adversary.

In election committees of the English House of Commons, this effect of the right of expunction has been matter of experience and remark. Knocking out the brains of the committee, is the phrase by which the expunction has in this case been designated. Of the three elements of appropriate aptitude, intellectual aptitude and active talent have been the two only ones in view. For reference to appropriate moral aptitude, cutting out the heart of the committee, or something to this effect, would be necessary, if, in a body so composed any such organ as a heart could have place.

§ 8. *Securities for appropriate aptitude.*

In the determination of the individuals serving as members of this obligatorily-attending committee of the public-opinion tribunal, the appropriate aptitude of the parties must be kept in view.

Deficiency in appropriate moral aptitude will be corruption, or have corruption for its cause. Corruption is in this case either *precedental* or *subsequential*; namely, with relation to the time at which it is believed, or more or less likely to be believed by the juryman, that, on the occasion of the suit or cause in question, he will have to serve.

Of precedental moral inaptitude, the most extensive causes, in a republican state, are antipathy and sympathy on the ground of party. To evil from this source, the nature of the case excludes the possibility of any completely effectual remedy: all that can be done towards it, is by power of dislocation given to the parties on each side. In this case, in so far as the proposed bias of the jurymen in attendance is known or conjectured, those on both sides against whom the persuasion or suspicion applies with greatest force, will on each side, if the faculty be given, be dislocated.

In the language of English law, *dislocation* thus applied, is *challenging*.

In a monarchical state, supposing any such institution as that of a jury admitted into the judicial system, the system of corruption inseparable from the government will have infused and kept up throughout the whole population, an all-pervading spirit of party sympathy and antipathy, altogether incompatible with right decision in any sort of suit or cause to which it applies.

Partiality from a public cause may be more or less open and exposed to general knowledge or suspicion: partiality from a private cause, much less so.

In the case of a jury, after the exhaustion of the whole stock of possible remedies which the nature of the case admits of, — self-regarding-interest-begotten, sympathy-begotten, antipathy-begotten, and prejudice-begotten partiality, to a vast extent, will have place: and that in such force, that misdecision will continually be the result of it.

Such will be the case, whether the part taken by each juryman be known or unknown —unknown, in so far as the nature of the case admits of its being so; which cannot be the case, but to an extent in a considerable degree limited.

If, as is throughout the case in English practice, the decision is represented as unanimous, — here, that which to no person can be unknown is, that by every member of the jury, concurrence in the obnoxious decision was given; for who the members of

the jury are, is seen by all present in the judicatory.

Here, then, are all twelve — that being in every case the number — exposed to the enmity of all those to whose wishes the decision is adverse.

A case that may very well happen, and that cannot but happen, is, that without its being either known or suspected, jurymen, one or more, may have a pecuniary interest in the event of the cause — an interest equal, or in any degree superior, to that which any party has on either side. Here, then, is inducement sufficient to cause a single man to produce by the characteristic torture, on the part of all the others, accession to his side. For submitting to it, his compensation may be ample to any amount, while in the instance of no one of the whole number with whom he has to contend, has compensation place in any shape.

Suppose a majority to be admitted to determine the decision; and, in the first place, suppose the side taken by each known in every case, no expedients being taken in the way of concealing it. In this case, the moral corruption, the solemn insincerity and mendacity, is excluded. But the exposure to ill-will, with the attendant inducement to partiality and misdecision through fear, is rendered still more certain and extensive; not one of the jury but makes to himself, and stands for ever exposed to, a host of adversaries — all those without doors whose affections are on the opposite side.

On the other hand, on this supposition, the part taken in the decision by each juryman is exposed to the tutelary action of the public-opinion tribunal. Here, then, is the breast of the juryman acted upon, and agitated by, conflicting interests: as between right decision and misdecision the uncertainty is entire, the suffering certain, and to an unlimited degree capable of being intense: the option may be between having the good opinion and good-will of all persons but one, with whom he has any particular connexion in the way of interest or sympathy, and the forfeiture of the good-will of some one, on whose good offices the whole prospect of his life depends.

Suppose, now, the decision of the majority sufficient, but secresy, by expedients more or less efficient, endeavoured to be preserved — preserved, in a word, by the most effectual of all expedients, suffrages given as in the case of a well-conducted ballot, with all the secresy which the nature of the case admits of: to all persons without doors, the result, in respect of *numbers* on both sides, known and declared: this, and nothing else.

Still as between juryman and juryman — between each one, and one or more, or all of his fellows — the secresy will be in a high degree uncertain.

For the sake of securing in every instance a majority on one side or the other, the number will of course, in that case, be an odd one.

In the case of the smallest odd number, the non-secresy will be complete: numbers in this case, two to one. Each one knowing on which side he himself has voted, will know, if he be the only one on his side, to a certainty, on which side the two others have voted.

If, indeed, he be one of the majority of two, what is possible is, that as between the two others he will not know to a certainty which has been on his side — which on the opposite side. But on this supposition, there must either have been an absence of all discussion, a dead silence, or on the part of the two fellow-jurymen, on one side at least, if not on both, a display of the vice of insincerity; and that in such perfection as to have been successful.

True it is, that as you increase the number, you increase the probability of uncertainty; but the number may rise to five, seven, nine, eleven, thirteen, fifteen, and still, unless discussion be excluded, the probability of uncertainty be very inconsiderable, and after all, but partial, applying to this or that one or other small proportion of the whole number.

§ 9. *Jurymen, number of—proportion requisite to command the verdict.*

1. Number. The smallest capable of fulfilling the purpose.

Increasing with the number is either vexation or expense: vexation to the jurymen, if time, and labour of attendance, and operation, are not compensated for; expense, if they are.

Jurymen, though but ephemeral judges, are not the less judges: call them by that name, the conception in respect of vexation and expense will be the more adequate.

2. Proportion requisite to command the verdict.

In cases non-penal, there is little difficulty. Misdecision may happen in any case; but from the nature of the class of cases thus denominated, no danger is indicated as attaching to misdecision on one side of the cause, greater than from misdecision on the other. If any such difference in point of danger is discoverable, it must be by a particular examination of the cases referable to this head. In one point of view, number and proportion are united. The prime object is to secure decision on the one side or the other, in contradistinction to nondecision; for nondecision, in so far as it has place, is denial of justice. In effect, however, it is decision against the plaintiff's side; but it is without sufficient grounds; for, supposing the ground sufficient — sufficient in the eyes of those to whom it belongs to judge, a decision would be pronounced in positive terms against

that side. Make the number of jurymen odd, a positive decision on the one side or on the other is by this means secured; and on whichever side it is given, should the decision be erroneous, no greater mischief is as above likely to ensue, than if the misdecision were on the other side.

Very different is the result in a case of a penal nature. By punishment of an individual who is not guilty, greater is the evil produced than by non-punishment of an individual who is guilty.* Of this evil the elements are as follows: —

1. Mischief of the second order: alarm, self-regarding alarm, produced in the minds of the people at large, by the apprehension of undue suffering from the like source.

2. Sympathy with the sufferer and his connexions: pain of social sympathy.

In both its branches this evil will increase with the magnitude of the punishment. — Where the punishment is mortal, this evil is at its maximum. In this case the mischievousness is created, not so much by the magnitude of the punishment, as by its irremediability—by its not being capable of being made to cease, and by the exclusion it puts upon all compensation or satisfaction — upon good in every shape given to a party injured, in compensation for the injury.

To set against the superiority of evil that has place in the case of undue conviction, and consequent execution, as compared with that of undue acquittal, an expedient naturally, and not unfrequently resorted to, has been, the requiring for the producing a conviction, votes more in number and proportion than for producing an acquittal. Hereupon come two opposite dangers: —1. Allow conviction to have place where, in the opinion of one or more of these judges, the offence charged was not committed: in a proportionable degree, the evils above stated as flowing from undue punishment, have place. 2. Give to one, or any other small number of votes, the effect of preventing conviction: you let in the danger of undue acquittal through corruptive influence, or ill-applied sympathy. Of these two opposite evils, neither is capable of being completely excluded; but by apposite arrangements, they are each of them capable of being diminished — diminished, and that in such a degree as to supersede the demand for that multitude which, in the case of these ephemeral judges, has commonly been excessive.

So far as regards criminal cases, the grand argument is this: — Would you endure to see that man treated as guilty, who, in the eyes of though it were but a single individual of such a company, who by office are all good men and true, is innocent?

In the instance of this class of cases, those which are not only criminal but capital — such has been their prominence — have in a manner eclipsed all those whose place is inferior in the important scale. The eclipse is altogether a natural one. In the original pharmacopeia of English jurisprudence, mortal punishment constituted the general remedy: mortal punishment constituting the general rule, punishment short of mortal, the exception. Under a jurisprudence thus composed or organized, think what, in a mind not altogether destitute of human sympathy, must have been the impression naturally made by the conception thus started. As in the eyes of the dissentient juryman, so in all other eyes to which the case presented the same aspect, all who concurred in the verdict of which the death of the accused was the consequence, would wear the aspect of murderers.

The mischief consists in giving to the punishment such a form, that in case of misapplication, the evil of it is irreparable. But to an eye the research of which is confined to the surface, destruction of the offender presents, in the case of punishment in this shape, a degree of security such as is not capable of being given by punishment in any other shape Experience proves, that from causes foreign to the present purpose, by the giving of this shape to punishment, security, instead of being increased, is lessened. But in the rank of life in question, so sensitive is selfishness, that neither the will, nor the understanding, necessary to a research below the surface, are to be found.

On the occasion of the decision pronounced by the jury, shall unanimity be made necessary?

Otherwise thus: — in giving his suffrage towards the formation of the decision, shall each juryman be permitted to give his own opinion? or shall he be compelled to give as his opinion, that which is not?

Were reason and morality to decide, the question thus put would contain the answer. But in the course given to the practice, reason and morality have been treated with the most complete disregard. Time out of mind, the practice has been determined by custom, the effect of no one can say what cause, in an age of which all that is known is, that it was a barbarous one.

Dissect this transaction, and note well the circumstances of which it is composed: —

1. The decision pronounced by the jury is accompanied by the ceremony called an oath. In and by this oath is understood (if anything is understood) a promise that the opinion delivered by the person in question shall be

* This supposes that the non-guiltiness of the convicted individual either is at the time, or becomes thereafter, an object of popular belief, more or less extensive and intense. For, suppose the contrary, the suffering of one who is not guilty is not greater than the suffering of one who is guilty. It even is not so great. For to support him under the affliction, the not guilty has considerations which the guilty has not.

an opinion which, at the time of his delivering it, he really entertains. As often as it is thought that a promise of this sort is violated, that is to say, that the opinion which the man has delivered accordingly as his, was not the opinion which he at that time entertained, he is considered in law, and in public opinion and language, as having committed an act repugnant at the same time to the dictates of law and morality. The name by which this act is designated, is perjury. As often as among a jury, at the time of pronouncing the decision thus given in as unanimous, any difference of opinion has place (insomuch that while the opinion given in as the opinion of the whole, is the opinion of one or more, others there are, one or more, whose opinion it is not,) perjury, it is manifest, has been committed. Either this is perjury, or nothing that can be named, is perjury.

Of the persons by whom the perjury in this case has been committed (the whole of the jurymen being twelve,) the number may have been any number from one to eleven inclusive. Not uncommonly the number of perjurers on this occasion is known to have been eleven.

2. Next comes the question, in what way is it that this perjury is brought about? In what way? by what means? The answer is — torture.

By torture, taken in the literal sense, is universally understood the employing pain of body, or fear of the immediate application of it, to compel, at the hands of the individual to whom the pain or the fear is applied, the performance of some act, which it is (or at least, by the person by whom the torture is applied, is thought to be) in his power to perform: to compel him in such sort, that on the performance of the act, the pain or the fear, whichever it is, ceases, but till then continues. Here, then, we have perjury produced by torture.

3. Now as to the person or persons by whom the torture is administered, and the perjury produced.

These persons are of two, or even more descriptions.

For simplicity of conception, suppose it the case where the number of the perjurers is eleven: one, and one alone, not being a party to the perjury. In this case it is by the intermediate agency of this one juryman that the torture, by which the perjury has been effected, has been inflicted on all the rest. At the same time it has been inflicted on him by himself. Thus we see eleven out of twelve jurymen perjured, and all twelve tortured. For the pain of body thus inflicted on himself, the juryman who is not perjured, has received a compensation, which in his eye is adequate: he has saved himself from the guilt of perjury, and he has exercised an act of power over his fellow-jurymen.

When, at the instigation of one person, perjury is committed by another, subornation of perjury is in lawyer's language said to have place: a person at whose instigation the perjury is committed, is in consideration thereof termed a suborner.

Here then we have eleven persons perjured, twelve persons tortured, and one person who is a suborner.

But subornation may have place in a chain of any length. The suborners, one behind another, at so many different distances from the immediate act and its agent, may be such in any number, forming or occupying so many lengths in a chain of subornation. A instigates B to commit the perjury; or A instigates B to instigate C to commit the perjury; and so on to any length.

The immediate suborner would not in the manner above explained have instigated C and the others to commit the perjury, had it not been by the power given to him by another person, who thereby becomes an anterior suborner — a suborner of the first remove: thus forming or occupying another and higher link in the chain of subornation and perjury.

The person by whom this power is possessed and exercised is a judge — the presiding judge: the judge before whom the trial is carried on, and by whom all the operations performed on the occasion are directed.

In this way, on condition of inflicting on himself and the other eleven a degree of uneasiness which no one of them but himself can support, any man has it in his power to prescribe the opinion that shall be delivered by the rest, and thus converts them into perjurers. The number of the persons capable of being on each trial thus dealt with, is the number of the persons employed on the trial in character of jurors.

The mode by which this power is exercised is, to him by whom it is exercised, liable to be so painful, that the case of its being so exercised is not an ordinary one. In the ordinary case, those in the minority give up their opinions, and join with the majority. To this junction, there will naturally be two inducements: — 1. The general perception, that in case of diversity of opinion, the chances in favour of rectitude, will be in the direct ratio of the number of the persons on the different sides. 2. That in a larger number, the chance is greater of its containing an individual capable of thus subduing the others, than in a smaller.

On the other hand, *cæteris paribus*, the chance in favour of rectitude in the case of any opinion is as the number of the persons by whom it is embraced. According to this rule, when by one single man the decision contrary to the opinions of eleven others is thus produced, the probability in favour of wrongness of decision is as eleven to one.

If instead of twelve, the jury consisted of

no more than three, the probability in favour of a wrong decision thus produced, could never by the above rule be greater than as two to one.

It follows, therefore, that the more numerous the jury acting under this forced and false declaration of unanimity, the greater is the probability of this kind of perjury.

Now as to the general effect of this feature in the institution, on the rectitude of judicial decisions, and on the character of the government — in a word, on the greatest happiness of the greatest number.

Supposing the state of the law in general were what it ought to be, and is commonly said to be, — on this supposition, by every wrong verdict — by every verdict not given in accordance with the state of the law and evidence, mischief is produced. If by any such verdict, not preponderant mischief, but preponderant good is produced, the case is of the number of those in which the state of the law is different from what it ought to be— and not merely different, but to such a degree different, that by the breach of the law, and that breach a notorious one, less mischief is done than would have been done by the observance of it.

To say, then, that in the present state of the law, taking the effects of this pretended unanimity in the aggregate, the result of it is beneficial to society, is as much as to say, that such is the state of the law, — taken in the aggregate, that society reaps a quantity of clear benefit from the aggregate number of the breaches of the law thus produced.

In this position is moreover included another, viz. that in the bulk of the population, at any rate in that part of it from which jurymen of the class in question are drawn, there exists such a regard for the welfare of the community, as, on the part of the class of those by whom laws are made, is not to be found. For if there were, then by repealing or giving the requisite modification to those laws, the breach of which is wont to be thus produced, the same effect would be made to have place, and without being accompanied with any abuse as is at present produced — an abuse so flagrant, and so plainly repugnant to the almost universally acknowledged principles of morality and religion.

Under the unanimity system, the usefulness of jury-trial is as the badness of the substantive law in general, and in particular the constitutional branch. This unanimity is therefore bad in the Anglo-American United States, but good in England.

Admitting the effect alleged, viz. the force put upon the will of all but one, by the one, and the substitution of the will of that one to the will of the other eleven, where, it may be asked, is the proof that by the breach of the law, — by the breach as thus effected, more good is commonly produced, than would have been produced by the observance?

Answer: No such effect can be produced, but by a more than common degree of energy. But setting aside the case of bribery, which could not without an uncommon concurrence of circumstances have place, and which in fact is very seldom, if ever, supposed to have place,—and the case of a sinister interest produced by other circumstances,—a case which in the penal branch can very seldom have place — the degree of energy requisite for the production of this effect can scarcely be produced by any sort of cause other than that, for the designation of which the name of conscience or principle is commonly employed; viz. sensibility to the force of social sympathy, sensibility to the force of the popular or moral sanction, or sensibility to the force of the religious sanction: an indifferentist will pin his faith on the opinion or the supposed opinion of the judge. In the case of neither of these classes is it common for any such energy to have place.

For marking the separation between the cases in which this unanimity may be of real use, and those in which it cannot be of real use, one line, or at most two lines, may suffice. It may be of use, and is of use, in all those cases in which, whether in respect of the prohibition, or in respect of the punishment, the law (being detrimental to the interest of the subject-many) ought not to be in existence, and that in such sort, that it is better for the subject-many that no obedience should ever be paid to it, than that no disobedience to it should have place. It is of use therefore in the case of all those penal provisions by which monarchical government is distinguished from democratical—in the instance of all those laws by which the penalty for offences against person, property, or reputation, is raised to a higher degree in the case where the injured person is a member of the government, than in the case where he is a private individual, possessing no share in the powers of government.

It is of use in all those cases in which punishment is attached to the divulgation of opinions.

It is of use in the case of all offences against the revenue of government, when the government is to such a degree corrupt, and to such an exten established in the habit of sacrificing to the particular, and thence sinister interest of its members, the interest of the whole community, that it would be for the advantage of the whole community that the government should fall to pieces, and a different one be established in the room of it.

It may even, without going to such a length as to annihilate the government, be of use to a certain extent, and on certain occasions; viz. by increasing the difficulty the govern-

ment might be under as to the finding supplies: in such sort as to prevent the government from giving way on this or that occasion to that destructive propensity which in such governments has place on all occasions — the propensity to keep the country plunged in groundless and unnecessary wars.

If false declarations of unanimity, and torture for the compelling of the falsehood, are of use in this case, — give the benefit of the falsehood and the torture to all other cases in which unanimity would in some eyes be desirable.

Apply it, for example, to elections. Keep all the electors shut up together in close confinement, without food, and so forth, till they have given their votes in favour of one of the candidates: leaving the choice of the successful candidate to chance or wisdom, whichever may be most convenient. Not that, for giving extension to this supposed security for right conduct, there is any necessity for straying thus far from the so much admired pattern.

The twelve judges constitute a judicatory, and to complete the analogy, the number of the members is the same.* Take, then, this security for rectitude of decision, and apply it to the twelve judges. Not that in this case the need of it is in danger of being very frequent. Nowhere is it better known than in that pre-eminently learned assembly, how useful the appearance of agreement is to the giving, in the eyes of the deluded multitude, a colouring of reason and justice, to absurdity and injustice. On the occasion of those smotherings of evidence, by which impunity was given to the notorious crimes of Hastings, the twelve judges, under the tutorage of the head creature of the crown, were unanimous. The unanimity, which being capable of being declared, was declared, stood in the place of those reasons which, not being afforded by the nature of the case, were not to be found.

A case, and this too a law case, in which the demand for unanimity would naturally be more frequent, is that of the House of Lords. On the occasion, for example, of the Queen's trial, how much more acceptable a result might have been produced, had this security for propriety of decision been established in that most noble and august of all tribunals! A single peer, whose loyalty stood in need of recompence, while his constitution was hunger-proof, might have sufficed to have produced a result so much more desirable than that which took place.

When the perfection of judicature has thus been secured, secured in the House of Lords — one step more will secure perfection to legislation. For this purpose, the benefit of it must of course be extended to both Houses.

As soon as this instrument is subservient to right conduct in all those other and higher situations, so will it be in that of a jury: as soon, but not a moment sooner.

In England, one point of policy pervades and gives form and spirit to the system of government, and shape and effect to practice. It consists in confounding and obliterating throughout the whole field of government the distinctions between right and wrong: in such sort, that whatsoever would to any degree be wrong and flagitious, if practised by an individual not belonging to the class of rulers, nor commanded nor authorized by the appointed assortment of those who do belong to that class, becomes right and meritorious in the case of its being so authorized. For this purpose it is, that as often as any reason is undertaken to be given for this or that arrangement, forming part and parcel of the system of government, some manifest and flagrant falsehood (the more flagrant and absurd the better) is given and passed from hand to hand, as a sufficient reason for it, and justification of it. Thus, in speaking of an individual so situated that it is impossible for him ever to do right — that the whole of his conduct as such is occupied in the doing of wrong — that his very existence is one vast wrong — that by the maintenance of that one individual in the state in which he is placed, others, the most mischievous of whom is beyond comparison less so than he, are to the amount of many thousands destroyed by lingering deaths, and others, to an equally unlimited number, kept from coming into existence, — of this individual it is, that a phrase in every mouth ascribes the impossibility of doing wrong; and of this complexion, throughout the whole of the field, is the language which calls for prostration of the understanding and will, under the name of government; and in particular, of that which with a still louder voice calls for a still more abject prostration of those same faculties, under the name of justice.

To lies, in so far as applied to the purposes thus described, the name of fictions is given; and by this one denomination — such is the effect of fraud when backed by power — the character of wisdom and virtue is understood to be given to a mixture, in the composition of which it is difficult to say which of its two ingredients is predominant — absurdity or vice.

Ungrounded would be the imputation, if to the practice thus described any such adjunct as wanton were attached. In wantonness is implied thoughtlessness. But in this case, whatsoever part folly and imbecility may have had in giving increase to it, the deepest reflection, grounded on long experience and acute observation (all along keeping steadily in view the universal *actual* end of government — the greatest happiness of those who have borne a principal part in the exercise of it) must everywhere have

* The number has of late years been increased to fifteen.—*Ed.*

borne a principal part in the original concoction of it.

Lest anything should be wanting to the efficiency of this policy, the force of the religious sanction has on this and all other favourable occasions been called in and added.

Thus it is, that for the converting into accomplices those who might otherwise have been tempted to become accusers, the whole multitude of individuals invested with the character of ecclesiastical functionaries have, as a condition precedent to their entrance upon that character, been (with exceptions too few to be worth taking into account), with anxious solemnity baptized in the filth of perjury.

By perjury is here meant, not anything that is criminal, — for effectual has been the care taken by the law that it shall not be criminal, viz. by the forbearing to render it punishable. By perjury, accordingly, is here meant — not any crime against the law, nothing more heinous than (not to speak of the offence against morals) a sin against God.

In some countries where polished minds bear sway — British India, for example — so rude, so uninformed, or so ill formed, not to say so deformed, is the general complexion of the public mind, that individuals, in number competent to the formation of juries, fit at the same time to be endued with the power ordinarily possessed by juries, would as yet, in the general mass of the population, be in few, if in any places, to be found. In hands so circumstanced, a function of such a nature as to apply, by the force of the legal sanction, a bridle to the power of the judge, could not be safely trusted — trusted with preponderantly useful effect. A power of such sure efficiency would in such hands be liable to be employed in the character of an instrument of depredation or oppression.

This being the case, it would not follow but that, operating with no other force than that of the popular or moral sanction, the function might in every instance be innoxious, and at the same time, in more shapes than one, serviceable. What is meant is, that — in cases of sufficient importance to pay for the complication, the additional delay, the vexation and the expense — under the respected name of a jury, a body of men should be introduced, appointed in some appropriate way, taking in that character cognizance of the cause, and delivering their verdict — delivering it, but to such effect, that the judge, though bound to hear it, and to hear it in public, should not be bound to conform to it; which being the case — in the event of non-compliance on the part of the judge — the effect of the verdict would be, that of an appeal from his decision to the tribunal of public opinion.

Independently of the effect of a verdict of this sort in each individual case upon the event of the cause, among the results of this practice, taken in the aggregate, would be the giving to each judicatory thus furnished, the character, as was before observed, of a school of justice — a school in which, while the individuals thus employed as jurymen were, upon the principle of mutual instruction, receiving their lessons in the character of scholars (receiving instruction thus in its most impressive shape,) the byestanders at large would, though in a shape not altogether so instructive, still be receiving instruction, not the less impressive and beneficial from its presenting itself to their conception in the shape of simple entertainment. Here would be a theatre: the suit at law, the drama; parties, advocates (if any,) judge, and jury, the *dramatis personæ* and actors; the bye-standers, the audience.

From the institution so modelled, another advantage — an advantage to social harmony on the part of naturally, and hitherto jarring materials, might be derived.

The body out of which, for each cause, the jurymen are drawn, be it supposed the sort of select and elected body above described. Of the elected Hindoos, let Mahometans be the electors; in like manner, of the elected Mahometans, the Hindoos; and as between religion and religion, so in the Hindoo religion, as between caste and caste.

In British India, suppose juries established, composed of natives: the case to a certain degree important, whether it belong to the penal, or only to the non-penal branch: the difficulty of preventing successful bribery would naturally be such as to put not only the ingenuity, but the perseverance of the legislator, to the stretch.

One expedient, in so far as the state of the population afforded an adequate mixture — a mixture of the two religions, Hindoo and Mahometan, in the composition of the jury, might afford some check: always supposed, the declaration of unanimity was not made requisite; for in that case the absolute command of the verdict is given to any one juryman whose perseverance is sufficiently paid for.

So far as Mahometans are concerned, the composition of this kind of jury presents no difficulty; not so, in so far as Hindoos are concerned. Even supposing Mahometans and men of other religions out of the question, among the Hindoos themselves the deplorable fancies by which differences in dignity and purity are imagined, as between caste and caste, present a labyrinth such as no distant eye can pervade to any such purpose as that of deciding what mixtures would, in such a case, be unendurable, what endurable.

Declaration of unanimity being necessary, suppose the individuals, of whom in the cause in question the jury will be composed, predetermined and foreknown: by making sure, though it were of no more than one of them, say, for example, by a bribe, a party might

be sure of gaining his cause: a party whose all (the suit being a non-penal one) depended on the event of it, would seldom shrink from such a course. Enthusiasm, physically possible, but never to be reckoned upon, excepted,— in a cause where his life depended upon the issue of it, no man ever would shrink from such a course. In a certain state of society, public opinion and habits not being favourable to such a course, the pursuing it with success might be attended with more or less difficulty, even to such a degree as that the probability of it should not be great. But states of society might be found, and those too extensively prevalent, such as to substitute in this respect, to difficulty and improbability, facility and probability. In British India, for example, suppose a capital case: a jury composed of natives, the individuals known to the defendant by information, sufficiently early for such a practice, one juryman (though there were no more) needy, and the defendant's pecuniary means ample enough to pay the juryman's price, — impunity here is a matter of certainty.

CHAPTER XXIV.

SPECIAL JURIES.

A SPECIAL JURY is a petit jury, composed of members distinguished by opulence from those of a common petit jury.

This institution, a palpable innovation, a production of the last century, is of the number of those benefits for which the people of England stand indebted to the Whigs of England.

It had for its purposes and objects —

1. To assist in the destruction of the liberty of the press.

2. In revenue causes, to provide for the joint instrument of the monarch and aristocracy in the situation of chief judge of the chief revenue judicatory, in the room of a bridle, — an instrument, and a cloak.

3. In all cases in which the interests of the ruling, the influential, and the opulent and consuming few stand in competition with those of the subject, the laborious and producing many,—to give to the few whatsoever facility could thus be given, by sacrificing the greatest happiness of the greatest number to that particular and sinister interest.

4. In all cases in which the interests, and thence the will, of the monarch and his instruments of all sorts, are in a more particular manner concerned, and in particular in Parliamentary election cases, to secure to the power of the monarch, by whose will, directly or indirectly applied, they always receive their situation, an instrument on which he might depend for giving execution and effect to that will, on all occasions.

5. To put an additional quantity of money into the hands of the lawyers.

The infusion of this poison into the frame of government was accordingly the fruit of a conspiracy between three parties — the monarch, the aristocracy, and the lawyers.

In all causes in which such is his Majesty's pleasure (cases of felony and a few others excepted,) his Majesty has a clear and uncontested right to a special jury for his jury; the party on one side has thus an incontestable right to the nomination of the judges.

An engine thus convenient — how happened it that it escaped being employed in cases of felony?

Under a form of government which has for its object the greatest happiness of the greatest number — that of the Anglo-American United States, for example — any limitation to the application of the investigative branch of procedure, to a power so necessary to good judicature in all cases, will, when once brought to view, be seen to be beyond dispute an imperfection.

Under a form of government which has for its main and characteristic object the sacrifice of the greatest happiness of the greatest number, to the particular and sinister interests of the members of the government and their adherents, it is, and to a vast extent, only by some imperfection less mischievous, that any security, how imperfect soever, can be obtained from more mischievous abuse. Under a form of government which has for its object the greatest happiness of the greatest number, the *laws* will (bating this or that casual misjudgment, oversight, or want of discernment) have that same end, not only for their object, but for their effect. With no other exception than the one just alluded to, it will, under such a government, be a result conducive to the greatest happiness of the greatest number, and thence a desirable one, that the execution and effect given to the laws should throughout be entire and uniform. Under a government which has for its object and effect the advancement of the sinister interest above mentioned, and thereby the continual sacrifice of the greatest happiness of the greatest number, it is to a certain extent, and that a vast and difficultly definable one, conducive to the greatest happiness of the greatest number, that the laws, such as they are, should to the greatest extent possible fail of being carried into execution and effect.

In a country thus labouring under the yoke of sinister interest, so vast will be the extent and mischievous tendency of those laws and arrangements, by which sacrifice is made of the greatest happiness of the greatest number to that sinister interest,—that rather than full effect should be given to this disastrous class of laws and arrangements, it is conducive

to the greatest happiness of the greatest number, and thence clearly and eminently desirable, that the whole frame of the laws and government should labour under a degree of general imbecility and inefficiency as effective as possible.

The laws and other arrangements by which the liberty of the press is sought to be suppressed, having for their object, and if carried into effect, their sure effect, the obliteration of those few, imperfect, and ever precarious shades of distinction, by which the limited is distinguished from a pure monarchy,—it were a lesser evil that crimes of all sorts should abound still more than they do, and juries give false verdicts still more frequently than it is endeavoured to make them do, than that the designs and endeavours against that vital security should be accomplished.

Under a government which has for its object the greatest happiness of the greatest number, official frugality is an object uniformly and anxiously pursued: peace, were it only as an instrument of such frugality, cultivated with proportionable sincerity and anxiety: any want of effect given to the laws, by which contributions are required for the maintenance of government, universally felt and regarded as a mischief: all endeavours employed in the evasion of them regarded as generally mischievous, and as such punished, and with full reason, by general contempt.

Under a government which has for its main object the sacrifice of the greatest happiness of the greatest number, to the sinister interest of the ruling one and the sub-ruling few, corruption and delusion to the greatest extent possible, are necessary to that object: waste, in so far as conducive to the increase of the corruption and delusion fund, a subordinate or co-ordinate object: war, were it only as a means and pretence for such waste, another object never out of view: that object, together with those others, invariably pursued, in so far as the contributions capable of being extracted from contributors, involuntary or voluntary, in the shape of taxes, or in the shape of loans, *i. e.* annuities paid by government by means of further taxes, can be obtained: — under such a government, by every penny paid into the Treasury, the means of diminishing the happiness of the greatest number receive increase; — by every penny which is prevented from taking that pernicious course, the diminution of that general happiness is so far prevented.

As, under the one government, every man, in proportion to the regard he feels for the greatest happiness of the greatest number, will give his strength to the revenue laws, and set his strength against all endeavours employed for the evasion of them, — so, under the other sort of government, in proportion to the regard he feels for that same object, will he set his strength against the laws, and in support of all endeavours employed for the evasion of them. Thus in particular, and so in general. In so far as the laws have been made every man's enemy, every man in defence, not only of his own happiness, but of the happiness of the greatest number, will, in desire and endeavour, be an enemy to the laws

CHAPTER XXV.

GRAND JURIES.

IN the name Grand Juries, the name of juries being included, the appendage thus denominated cannot be altogether passed over in silence.

A grand jury is a superior kind of jury. A grand jury has for its characteristic and peculiar function the salvation of the innocent.

A jury is a good thing: a grand jury is a jury: *ergo*, a grand jury is a good thing.

A jury is a useful thing: a grand jury is not only a useful, but an honourable thing; for a grand jury is a grand thing.

Such being the logic (this logic not being altogether clear of fallacy,) — to counteract the influence of it, it is necessary to show what sort of a thing a grand jury really is.

A grand jury is a bar to penal justice. For whatsoever purposes originally set up, it has been kept up, and employed by the sub-ruling few, under the influence of the ruling one, for the securing to them and their adherents the benefit of impunity, on the occasion of any misdeeds committed by them, in the course of the sacrifices made by them of the greatest happiness of the greatest number, to their own particular and sinister interests.

The petit jury tries a man, and either acquits or convicts him: the grand jury either refuses to put him, and thus prevents him from being put, upon his trial, or puts him upon it.

A petit jury is composed of twelve, neither more nor less; whether it be for acquittal or for conviction, a declaration of unanimity, true or false, no matter, is necessary for the effectuation of it: a grand jury consists of twenty-three; of that number any lesser number, so it consist of twelve, is necessary, and sufficient to give validity to what is done.

Of the procedure before the petit jury, a characteristic and indispensable property is publicity: of the procedure before the grand jury, a property still more characteristic and declaredly secured, is secresy: the ceremony of an oath is employed for the securing of it; in the official oath exacted from grand jurors, the promise of secresy constitutes a distinct article.

The function of the grand jury applies itself to two different classes of offences: to felonies and to misdemeanours.

Viewed at a distance — viewed in a general point of view — the division into felonies and misdemeanours corresponds in the main with the above exhibited division into penal cases, which are such by reason of aggravation, and penal cases which are such for want of an individual specially injured.*

Of the power originally given to the grand jury, the effect was, that without its fiat no operation of judicature, at the expense of the personal liberty of an individual suspected, could lawfully be performed: it had thereby a veto on such operations; preservation was thereby given to the personal liberty, and by means of the oath of secresy, to the reputation of individuals. In latter times, however, this security, with the effects, good and bad together, which could not fail to be attendant on it — this security, the name and power of the grand jury notwithstanding, has in both those shapes been at an end: on application by any individual, by a warrant from a single local magistrate, styled a justice of the peace, appointed and removable at any moment by the monarch, any man is on this occasion committed to prison; there to remain, or thence to be liberated, according to the discretion of the magistrate; unless, and until his liberty be disposed of by some other authority, not here to the purpose.

Those effects which are composed of evil, with little or no admixture of good, remain in full force behind. For example, the power by which, for crimes of the most extensive mischief, by a knot of men themselves armed with complete impunity, without danger so much as to reputation (reputation being covered by the oath of secresy,) impunity is secured to criminals, in any number, at pleasure.

In so far as what legal security there is, against offences by means of which, by men of this class (viz. the class of the sub-ruling few acting under the influence of the ruling one,) sacrifices are made of the greatest happiness of the greatest number, to the particular and sinister interests of those same rulers, is given by the punishment and mode of procedure applied to the misdeeds styled felonies, — impunity and complete licence is thus accorded. For anything or for nothing, put men to death in any numbers: if, according to the view of this section of the aristocracy (instrument and confederate of the monarchy,) it is for the advantage of those conjunct interests that the men should die, you are safe. You are secured not only against punishment,—but, in so far as under the same influence, the same inclinations prevail in that class of the instantly-removable agents of the monarch, styled justices of the peace, — from disrepute. So much as to felonies: those cases included, which, though not in denomination, are, in respect of punishment or investigative procedure, or both, dealt with as felonies.

Now as to misdemeanours. Cases in which with some exceptions, principally regarding offences against the persons of individuals, investigative procedure has not been provided:

In so far as investigative procedure is suffered to take place, whatsoever protection is afforded against punishment at the hands of law, does not extend altogether to disrepute: the grand jury, when it has given to its instrument and accomplice security against punishment, has not of itself — has not, without the concurrence of a sufficient assortment of other accomplices, in the situation of justices of the peace, together with an appropriate suppression of the liberty of the press, given him security against disrepute. In the cases to which investigative procedure has not been extended, the security afforded to misdoers by the power of the grand jury is more entire.

Whatever it may have been at one time, as matters have stood for a long time, a grand jury has been, is, and will be, an instrument much worse than useless: it gives no protection to the subject many against the ruling one, or the sub-ruling, opulent, and the influential few; it does give protection to the ruling one — to the sub-ruling, opulent, and influential few, against the subject-many.

Bill found by the grand jury, information grantable by motion, information filed *ex officio* for alleged offences against person, property, or reputation: of all these three inlets to prosecution and trial, the one and the few have their choice: against the subject many, in any contest they may have with the many or the few, all these inlets to justice, or the show of it, are closed: information on motion, by want of opulence on their part; information *ex officio*, by want of power.

Vain altogether is the pretence that in this power you have a protection, that innocence has a protection, against unjust prosecution — a protection set up at the very threshhold — a protection against preliminary imprisonment.

If this protection were a preponderantly useful and desirable one, how much more so would it be in the case of felonies, than in the case of misdemeanors!— in the case in which you have taken it away, than in the case in which you suffer it to stand!

As at present constituted, a grand jury is an assembly composed exclusively of gentlemen: gentlemen to the exclusion of yeomen. In the vocabulary of English jurisprudence, these denominations have an import which, if not altogether determinate, is at least meant to be so. The class of gentlemen, is the class of the sub-ruling, the opulent, the influential few; the class of yeomen is the class of the

* All common assaults on individuals, are classed under the title of misdemeanors.—*Ed.*

subject many. On this occasion, if the greatest happiness of the greatest number were the end in view, in the composition of this transitory body, the majority should be of the class of yeomen; for if some must be sacrificed, better the few to the many, than the many to the few: not that any such sacrifice would have place.

If any regard were paid, so much as to the appearance of equal justice, there should be a mixture of both classes, and the class of the few should at any rate, not have a majority, as against the class of the many.

CHAPTER XXVI.

QUASI-JURY.

§ 1. *Preparatory or preliminary observations.*

THE design in the use here made of a jury, — that is to say, of a sample taken at random of the promiscuous multitude — the design is not to invest a set of men so circumstanced, with an arbitrary power over their fellow-countrymen; but to add to the effective force of the other checks applied to the power of the judge. On the part of such an assemblage, no one element of appropriate aptitude in any degree above the lowest could reasonably be depended upon: on a judge placed in a situation fenced about as here — on a judge, in so far as on any person invested with such power as it is necessary to arm his situation with, so long as the eye of the public-opinion tribunal is kept steadily fixed upon him, dependence may be placed.

Accordingly, they are not merely authorized, but invited and urged to take cognizance of every matter that comes before them, and on whatever occasion, or on whatever account they feel disposed: whether for the purpose of assistance to the understanding, or controul upon the will of the judge, — to give expression, collectively and individually, to their sentiments. But this opinion is not made obligatory on the judge — it is not made decisive of the fate of the cause.

By this means, instead of being placed on shoulders too lowly situated to be depended upon for being duly sensible to the pressure of it, the responsibility is left to press with all its weight upon those shoulders in which that tutelary sensibility is at its maximum.

By the registration made on each occasion of the opinion of the jury on the one hand, and the opinion of the judge on the other, compared with the nature of the case (and this parallelism continued on throughout the stream of time,) a continually accumulating body of information, interesting in a variety of ways, will be secured: the progress of intellectual aptitude, as applied to matter of law and evidence, will be marked by it.

The judge will not, as he would otherwise, partly by the intellectual influence attached to his situation, or by fallacies and other artifices employed on purpose, have it in his power to remove from his own shoulders the just odium that would otherwise be brought down upon him by an unjust decision.

On the other hand, while in this direction, on account of its dangerousness, the influence of the committee of the public-opinion tribunal is here limited,— in another quarter, an enlargement clear of all danger is given to it. From an opinion which is not obligatory, evil cannot in any part of the field be in any shape produced. And in the situation of judge, if a check is necessary or useful in any part of the field he travels in, so is it in every other. Of a road, such as that here in question, if a watchman be useful in any one part, so must he be in every other: accordingly, under the system here proposed, in no part of his career is the probity of the judge left destitute of the benefit of the safeguard which it belongs to the power of the quasi-jury to afford. Of whatever point a judge has cognizance, of the same point a quasi-jury has concomitant cognizance.

Of the service, such as it is, which is rendered to justice in systems in which the word jury is employed, it may be questioned whether it be in a direct way, or otherwise than in an indirect way, that upon the whole the greatest part of it is rendered. Along with the jury, a portion of the public has all along been let in. The jury itself forms on each occasion a part and parcel of the great public at large; and in proportion to the change made in the persons by whom that function is performed, that portion receives enlargement. Hence it is, that in jury cases publicity of judication has been to a considerable extent, though nowhere in an all-comprehensive, nor therefore in an adequate extent, the practice: being the practice in those cases, the expectation of finding it so wher ever it has been the practice, has become general: and in this indirect way it is, that jury-trial is, to an extent more or less considerable, of use in cases in which, as to the affording any binding check upon partiality on the part of the judge, the jury itself might be little better than useless. Witness all those cases in which the choice of the jury is immediately or unimmediately in the hands either of the judge or of some other dependent creature or creatures of the monarch: in all such cases, it may be a question whether, in the character of a check to improbity in the judge, it does more good than it does evil.

Not only has the public at large acquired the habit, and thence to a practical effect the right, of stealing in as it were under the cloak of the jury; but by the power given to the jury, the judge finds himself under the necessity of addressing his discourse to

them, explanatory of the nature of the case and of the grounds on which his advice and recommendation, if any is given to them, has been founded. Suppose, then, for argument's sake, an advice manifestly repugnant to justice given by him to them — what is the consequence? If he gives no reason, he does not give himself the chance he might have of prevailing by sophistry; and the injustice being without a mask, instead of compassing its object, will expose him to just reproach: if he gives reasons, their being by the supposition weak, they will expose him to reproach by their weakness.

Now as to the number of the persons whose services are to be exacted for the performance of this function. On this part of the field, a conflict has place between the direct ends of justice on the one part, and the collateral ends on the other; between the good attached to the degree of security afforded against the evils of misdecision, and the evil composed of vexation to these functionaries, and expense either to them or to the community at large.

True it is, that in regard to extent, proportioned to the vexation and expense is the instruction, moral and intellectual, thus spread over the community: but in regard to the vexation, the quantity is much more palpable, than of the quantity of instruction reaped, the existence will be certain.

Of these several quantities, any estimate approaching to adequate correctness is impossible, unless the political state in question is given. The pecuniary sufficiency of the individual, the state of the communications, being given, and the length of attendance being given, the quantity of the vexation will depend upon the length of the journey to and fro; that is, on the distance between the abode of each individual and the judicatory. But the political state in question being given, the average of this distance will be inversely as the number of those judicial subdistricts or portions of territory resulting from an ulterior division.

Thereupon comes a question, — Shall these assessors be taken from every part of a subdistrict without distinction? or from a portion, no part of which is by more than a certain length remote from the judicatory? If without distinction, then comes inordinate vexation to those whose habitation is to a certain degree remote: if with distinction, in consequence of which, to those beyond the line, an exemption is granted, then is the population of the sub-district divided into two portions, the one of which is left in a sort of barbarous state in comparison of the other.

On an occasion such as this, a middle course might perhaps be taken, not without advantage. In the remote parts, the times of service might be less frequent than in the near part: the vexation, however, is in this case not done away with, only lessened; and the instruction is in the same proportion lessened.

Increase the number of those subdistricts, with those judicatories, — this vexation is indeed lessened, but the expense to the public is increased.

Under the division into subdistricts, shall there be any subordinate division — a division of those subdistricts into bis-subdistricts?

Answer: For the purposes of judicature, No. The extraordinary case of an appeal to the justice minister will answer every good purpose, of a greater number, and put an exclusion upon all the bad effects.

In the case of assessorship service, the time of demurrage, it may be observed, will naturally be considerably longer than the time of election service. For the election service, it may happen to be performed within the first minute; and the time requisite for receiving the vote, by dropping two recognized pieces of card into a box, can never, for all the votes taken together, be extended beyond the bounds of a single day.

The expense of the assessor while in waiting, — shall it be borne by the individual or by the public? On the individual, the burthen would be intolerable and needless: by the whole public the benefit is reaped; by the whole public ought the whole burthen to be borne. For functionaries of this class taken separately, the pay necessary will be to the lowest amount: nothing is there that could render it worth regard, but the number of those whose services are thus put into requisition. The bulk of the population being in almost every country composed of the lowest paid day-labourers, it will be composed of those to whom any casual deduction from the means of subsistence would be most irksome, and be most difficult of endurance: the pay should therefore be somewhat greater than that of the lowest paid day-labourer; say, for example, twice as much. Thus much for the assessors taken from the more numerous class.

In the case of the assessors taken from the more erudite class, the quantum, it should seem, should not be exceeded. By no addition that could be made to it, could any degree of proportionality — of equality, be maintained. On the plea of increase, it would require to increase with the amount of income; but to this mode of increase, the objection seems a peremptory one: publication of income would in general be irksome; nor could any correctness be given to the fixation without such an inquiry as would be the equivalent of a lawsuit. Nor to the more numerous class would any such gradation appear consistent with justice. In comparison with that of the more numerous class, the condition of those members of the more erudite class would, on the

face of the account, be seen to be in the same proportion more prosperous—the general mass of benefit derived from the government so much the greater: and proportioned to the benefit should therefore be the burthen, or justice and equality are obviously contravened.

Were the pay of an assessor ever so much greater than it is proposed to be, still it could not be, in the instance of every individual, in every conjuncture, an equivalent for the attendant vexation. Here, then, may be seen a reason for the permission of a substitute, in the room of any person on whom the lot has fallen — a substitute, on the condition that whatever be the qualification requisite in the case of the principal, that which is requisite in the case of the substitute shall be the same; namely, as here proposed, possession of the arts of reading and writing.

§ 2. *Quasi-jury, what.*

The denominations quasi-jury, and quasi-jury system, are here necessitated by irresistible considerations. By the word jury, the nature and design of this portion of a judicatory, some conception, however inadequate, is presented to view, and a general prepossession in favour of it will naturally be produced. At the same time, if without some intimation given that the two objects, how nearly soever related, want much of being the same, great would have been the confusion and perplexity introduced by the discrepancy between the denomination, and the thing thus denominated.

The institution called a jury, being the subject of such general applause — why on this occasion introduce not a jury, but a quasi-jury? not the thing itself, but only an institution bearing more or less resemblance to it? Conceived in the most general terms, the answer is—Because with this resemblance how faint so ever — with this faint resemblance, in addition to the other securities which have been seen, for appropriate aptitude on the part of the judge, all the good effects that have ever been looked for in a jury are produced, free from all the evil effects — evil effects essential and unpreventable, and to such a degree evil, as to render the use of it altogether incompatible with a system of procedure having for its end the ends of justice; inasmuch as it is in a high degree adverse to, and the use of it incompatible with, the attainment of every one of those ends. What, then! have its effects been from first to last, wheresoever employed, no other than so much pure evil? Answer: On the contrary, they have been productive, as has been already shewn, of inestimable good. But in what manner? — By this, and this almost alone; namely, by the very opposition of the institution to the main end among the ends of justice: that same main end being rectitude of decision, exclusion of misdecision.

On looking to the several elements or features of appropriate aptitude, it will be seen that, in the aggregate, jurors are essentially wanting: for appropriate moral aptitude there being, in a body of men so taken, no security; and in lieu of appropriate knowledge and judgment, there being a constant certainty of the opposite inaptitude — of inaptitude absolutely considered, and of inaptitude considered in comparison of the like quality in question, on the part of the judge.

Judication is a branch of art and science. In the most unapt judge ever seen, some proficiency in the art and science has been manifest: on the part of those men, who, to be least unaptly selected, must be selected at random, selected by fortune, not any the smallest security for any the least grain of any one of the elements of appropriate aptitude can be pointed out.

Of the institution here proposed, the object is to bring to pass, with some addition, whatever has been looked for at the hands of a jury.

If in any one state of society it be capable of answering its intended purpose, so will it in every other; for in the organization of it, a state of society, one at the lowest as well as one at the highest stages in the course of civilization, has been all along kept in view.

Taking up men from the most numerous class, and placing them in a situation in which the business of life in all its forms will be brought before their eyes, and a call made upon them for whatsoever exercise they are capable of giving to their intellectual powers — converting the judicial theatre into a school of justice, into which men of all ranks are compelled to enter themselves — it tends with continual increase to give strength to the aggregate stock of intellectual power throughout the community, and with continually augmented effect to render more and more apt those whom it finds least so.

At the same time, giving no decisive effect to the expression of their sentiments, it avoids altogether the exposing the welfare of the community to hazard from any ill-advised or perverse exercise of power, of which in that situation of life the will of men may be supposed susceptible: they may advise anything; they can give determination to nothing. For anything which they are allowed to do, or are at all likely to do, no evil is there in any shape which the community is exposed to suffer.

While at their hands society is not exposed to evil in any shape, — on the other hand, by the part which it is given to them to act, the quantity of evil which society would otherwise be exposed to suffer at the hands of the judge, great as may be the influence which they are enabled to exercise, — by no power given to

them, can responsibility on the part of the judge experience any the slightest diminution: on him, in every instance of whatsoever is done, the responsibility rests in all its undiminished weight.

The object has been to strew the way of the judge with such checks as, while they afforded no impediment to him in the right and proper course, would, when taken all together, be found to oppose an insuperable impediment to him as often as it could happen to him to make any such attempt as that of straying into any sinister course.

The course by which efficiency will thus be found to have been so perfectly established, is as simple in its description as in its contrivance. To the quasi-jury are given all the powers of judication — all the powers that are given to a judge, with only one exception; namely, the effectively imperative function — the function to the exercise of which is attached the power of giving execution and effect to the will of him by whom it is possessed: and this is the only one by which in any hands mischief can be done. Of themselves, nothing can they cause to be done: of themselves, nothing can they so much as prevent from being done. This power, in the shape in which they possess it, resembles in some degree what in mechanics is the power exercised by friction, — it is like the drag upon the wheel.

§ 3. *Quasi-Jurors, who, and how chosen.*

Hitherto there has been unavoidably more or less of the fictitious, in the idea attached to the appellation of committee or sub-committee of the public opinion tribunal: the members being self-appointed, not mutually present unless by accident, and fluctuating. But in the case of a jury, everything said of such a sub-committee is or may be realized: it is everywhere, or may be, and (at any rate to fulfil the professed ends of it) ought to be, an exact sample of that unofficial judicatory, although to the particular purpose in question, officialized.

From this source may be deduced what ought to be the principal and characteristic features of this fragment of an official jury, thus denominated: —

1. Stock from which the members are taken, — for securing appropriate moral aptitude, the whole of the male adults of the community; unless, for the better securing of appropriate intellectual aptitude, it should be deemed advisable, as in case of election of representatives, to confine the capacity, to those who have been found capable of undergoing a literary test. Object of this universality, exclusion of aristocratical injustice.

2. Locator of these ephemeral judges, — not *choice* but *chance*. Chance alone is sure to be impartial: chance alone is incorruptible. To place the choice in any human hand, be he who he may, is to lead him into needless and useless temptation — to infuse the poison of corruption into his veins.

By this means, and by this alone, as all danger, so all suspense and apprehension of partiality, stands excluded.

3. Being by supposition exempt from all corrupt interest, the suffrages given by these unpermanently official judges, may without inconvenience be covered with a veil of secresy: having no particular and sinister profit to gain by injustice, the course taken by each will be determined by his regard for that interest of his, in which he has for sharers all the other members of the community, — in a word, for that interest which is in each case on the side of justice. The eye of the public might in this case be even prejudicial to the cause of justice; for in the public might be this or that individual, by whose corruptive influence might be created in the breast of this or that juryman a particular and sinister interest, by which would be dictated and produced a decision and correspondent suffrage opposite to the decision dictated by a regard for the rules of justice, — and by reason of this opposition, opposition to the universal interest.

§ 4. *Expunction.*

Challenging, — that is, the partial dislocation of proposed jurors by a party — why not here employed?

Answer.—Reasons: 1. The vast aggregate body of vexation. By the provision made to that effect, vexation in extent and in intensity not inconsiderable.

2. Under the here proposed system, no such demand for the provision has place as under the existing system in England: the decision of the jury being in English practice obligatory on the judge; in the here proposed practice — not.

3. The decision not being obligatory, the demand for exclusion has no place. But the effect intended by exclusion, is here produced to much greater extent without exclusion — namely, by the questions which the parties on both sides are allowed to put to the several jurymen, for the purpose of ascertaining the existence or non-existence of a natural cause of partiality, and thence the probability of the effect. Be the answers what they may, the juryman is not inhibited from taking whatsoever part he feels disposed to take throughout the business. From his answers, the state of his mind in respect of partiality and impartiality is open to be collected: in case of apparent cause of partiality, it operates in diminution of the weight of his authority — just as, in the case of evidence, in diminution of the probative force of the testimony of the witness

4. By the omission of this institution, no small mass of complication is discarded.

§ 5. *Quasi-Jury, uses of.*

In respect of scientific, judicial, and active aptitude, it is here a sort of assumed postulate, that a set of men taken at random from the body of the people can never be regarded as being, by a great deal, upon a par with an erudite and experienced official judge.

The use of any such assessor is therefore merely confined to the contributing to the securing of adequate appropriate moral aptitude on his part, by the application of a check to the exercise of his powers.

In this capacity they are capable of serving, and may reasonably be expected to serve, independently of any degree of intellectual aptitude on their part, and therefore with as low a degree of aptitude in that shape as ever can have place. Why? The reason is, because their persons being unknown to him, the degree of aptitude actually possessed by them will be unknown to him. They may, every one of them, for any assurance he can have, be endowed with the very highest degree of appropriate aptitude in every shape.

What remains is, to secure on their part, as far as may be, appropriate moral aptitude in the shape and degree requisite.

The first quality to be provided for is — original impartiality.

The next is uncorruption. As to uncorruptibility, this depends on the particular frame of mind on the part of each individual, — a sort of fact in relation to which no adequate information can, in the nature of the case, be attainable.

What remains is — in presumption of corruptibility, to throw such difficulties as can be thrown in the way of the sort of intercourse necessary to the production of the noxious effect.

Without his putting himself in a considerable degree in the power of the person tempted, no person can in any such case apply temptation to the probity of a quasi-juryman.

The smaller and less certain the corruption derivable from success in the enterprise in question, the less the probability of a man's exposing himself to such hazard.

Of the body of assessors styled a quasi-jury, the use is, as has been seen, to add to the mass of securities for appropriate aptitude on the part of the judge. In this character, its operation is mostly confined to the moral branch of that same aptitude: to the degree of his appropriate intellectual and active aptitude, it cannot be expected to make addition, any otherwise than in so far as it contributes to call forth into action whatsoever stock of those desirable qualities it finds him in possession of.

To the power given to the body styled in English-bred law a jury, these same uses and good effects are attributed: and lest they should not be produced, a certain portion of the power of this erudite functionary is taken from him and conferred on those unerudite functionaries.

If at their hands, in comparison with him, any superiority of appropriate aptitude is in any branch looked for, it must be in the intellectual branch, — to wit, knowledge, for example, of the feelings of individuals whose condition is nearer to them than his: together with such casual acquaintance as it may happen to them to possess of the particular circumstances of the individuals on whose cases they have to pronounce.

Consideration had of the mass of securities provided, of which the maximization of publicity, and the effectual dislocability of all judges by the real representatives of the people, are the chief, — it will, it is believed, be sufficiently manifest, that without either jury or even quasi-jury, the securities for good judicature would be much more effectual than, by anything that can be called a jury, they ever have been made, or ever can be, anywhere. But forasmuch as, by the institution as here modified, a substantial addition seemed capable of being rendered to the efficiency of these same securities, this ingredient in the mass of appropriate arrangements could not consistently be withholden; not to speak of the wishes and even expectations which on this head the public-opinion tribunal could not fail to entertain.

The comparatively slight particular above alluded to excepted, only with a view to moral aptitude could any additional security be looked for at the hands of men so circumstanced.

The controul applied by a body of judicial functionaries to the conduct of the judge cannot be adequately effectual, unless it applies to every step taken by him in the course of the suit, from the commencement to the close. Such is that applied here in this code by the quasi-jury. Nothing approaching to it is that which is applied by the English jury. In a large proportion of the whole number of suits, that body has no place: and among them are those which arise out of the most important cases; and those which have place in by far the greatest number: the most important, — those, to wit, which give employment to the equity courts: those which have place in by far the greatest number, — those, to wit, which give employment to the small-debt courts.

Now as to the concomitancy of the controul of the jury with the operations of the judge. Out of an indefinite number of stages of operation, it is confined to a single one called the trial. But whatsoever would have

been the opinion and will of the jury, had the suit throughout the whole course of it been open to their influence, the judge may frustrate altogether: visibly, by operations concomitant or subsequent to the trial; invisibly, by operations anterior to it; and, upon the whole, in each case, by any one of a multitude of operations. In cases styled penal, the power of the jury is not quite so inefficient as in cases styled civil. In cases styled civil, the judge can in one way or other give success to the plaintiff's or to the defendant's side at pleasure. Not exactly so in cases styled penal. To the defendant's side, indeed, he can insure success, on any one of an infinite variety of devices, not one of which bears any the slightest relation to the justice of the case. Not quite so easy is it to give success to the plaintiff's side; — in other words, to punish, under the name of punishment, the defendant for a crime which, in the opinion of a jury, he has not or would not have been regarded as having committed. It can no otherwise be done than under accidental circumstances favourable to injustice in this shape; for example, by refusing the operations necessary to the obtainment of evidence, by which, if obtained, a just acquittal would have been produced.

The primary use there, is the forcing out of the mouth of the official judge, grounds and reasons for the decision which it is his desire should have place.

Fortunate is the state of things where the success of an operation is independent of the qualities of the individual operators. In this case is this primary benefit attached to the institution of a jury.

For whatever reasons the conduct of the judge should be subject to inspection in any one part of the procedure, — for the same reasons, so ought it in every other: for if by aberration from the course of justice, it is in his power to produce misdecision, or the collateral evils of needless delay, vexation, and expense in any one part; so is it in any other. Admitting then that the use of a jury consists in its exercising, and being seen to exercise, the function of an inspector of the conduct of a judge, the presence of this safeguard is useful, not to say necessary, from the very commencement of the procedure in the presence of the judge, to the very end of it. In the early days of jury-trial, it seems not improbable that this undiscontinued inspection actually had place: in the jury-court, as now in small-debt courts, commonly the same day, not unfrequently the same hour, which saw the commencement of a cause, saw the termination of it. The splitting of a cause into an indefinite number of parts, with long intervals between part and part — the jury not being admitted to be present at more than one of those parts — and a contrivance, by which the decision pronounced in their presence was overturned in their absence; — all these improvements in the art of fee-gathering were so many subsequent amendments introduced by degrees. Had the ends of justice been the object, the application made of this system of inspection would have been commensurate with the need of it; but the ends of judicature were the augmentation of the emolument and the power of the judge: hence the difference. In the best judicatory that could be framed — to wit, a single-seated judicatory — a judicatory in which a single judge presides, whose situation is permanent, and his functions exercised with open doors, — there being no person in particular who had any claim for reasons or explanations, for any of those statements by which a test of his appropriate aptitude in all its several branches is afforded, — arbitrary power would find itself in a state of comparative ease. Suppose a judge in any instance determined to pronounce a decision, of the unjustness of which he is conscious, what is the course that would be free for him to take? After hearing what is offered to be said on both sides, he will pronounce his decision. No sufficient reason, — the case (by supposition) not affording any, — will be seen for it. In this case, will any loss of reputation be the consequence? Not by any means a certain consequence. The prepossession which the power attached to the situation insures in favour of everything that is done in it, is an assured protection, and in a multitude of minds a constantly effectual one.

For the cognizance of a claim which must not exceed 40s., the attendance of a numerous body of judges, under the name of commissioners, is not grudged: of these commissioners the list being the same at all times. Still less need it be grudged, for claims of forty hundred or forty thousand pounds: the labour of attendance on the part of these inspecting judges being relieved by an indefinite frequency of change. If by the now established number of 12, the extent given to this burden would be rendered too great, scarcely can any reason be assigned why it should not be lessened: 11, 9, 7, 5, or even so few as 3, chosen upon a right principle, would be preferable to 12, all chosen upon a wrong principle.

In comparison of the power possessed by a juryman, whether under the English or the French system, how small is the power here given to a quasi-juryman, is altogether obvious. The quasi-jury all together, not having any obligative power, further than the enabling a party to appeal, — silencing their interposition, silencing the communication of their observations, is the upshot of all that corruption can do in this case. And unless in the cases where without such interposition the judge would go wrong, while by the check

applied by it he will be restrained from going wrong, and confined within the path of rectitude, — in no shape would any advantage be to be gained by the production of any such corrupt silence.

Of an institution beneficial upon the whole, concomitant with the beneficial effects are always an infinite multitude of uninfluencing circumstances, and, though in less number, obstacles, or opposing causes on every occasion: the great difficulty is to distinguish from each other these three classes of circumstances.

Of the beneficial effects of the institution of a jury, some apply alike to both branches of substantive law — the penal and the non-penal; others exclusively or more particularly to the penal.

Those which apply alike to both branches may be stated to be as follows: —

The main and all-comprehensive beneficial effect produced by it, in the several cases to which it applies, is the bringing to bear upon the decision the power of the public-opinion tribunal — a power which, in so far as it has place, applies itself to the most despotic governments, and diminishes more or less the evil which they have for their inseparable result.

This it does in three different ways. —

1. One is through the medium of *publicity*; the sort and degree of the publicity which it gives to that part of a suit to which it attaches itself; and that part is the principal one. The jury will form of themselves a committee of the public-opinion tribunal; and from its several members the information respectively possessed by them radiates out of doors through so many circles of indefinite extent, of which they are respectively the centres.

This being the most extensively favourite mode of judicature, the habit of publicity inseparably attached to it has extended itself to the several other forms. And sure it is that jury-trial has been a main security for the power of the public-opinion tribunal as applied to judicature.

True it is, that from the earliest times of which any accounts remain to us, a high degree of publicity has had place in judicature, and in times anterior to those in which the institution of a limited number of assessors, under the name of a jury, appears to have been in use. Witness the county courts and the courts baron. It is not therefore for its creation that the practice of publicity is indebted to jury-trial. It is so, however, for its preservation, and it forms accordingly the characteristic difference between English-bred law and Rome-bred law.

This publicity, with its advantages, exists in a state independent of jury-trial: it exists, as we have seen, where there is no jury-trial; for example, in the judicatories called equity courts, and in the judicatories called ecclesiastical courts, not to speak of the military courts in some instances.

In the account of beneficial effects, this, then, it may be seen, is distinct from that of the obligatory power possessed by the jury over the decision in all hitherto established instances; and may accordingly have place without it.

2. Another way in which it brings to bear upon judicature this same tutelary power, is by the obligation it imposes upon the permanently-official and all-directing judge, to pay his court to these his transitory colleagues, and submit to them, and through them to the public-opinion tribunal at large, in the form of reasons, whatsoever considerations he regards as necessary to the engaging them to pronounce a decision conformable to his wishes.

In this way, not only if the decision he wishes to give is unjust, but the injustice of it is to a certain degree manifest, exposure to public reproach is a consequence which it cannot be altogether in his power to exempt it from: the exposure is in this case effected either by the utter absence of all attempt at exhibiting reasons, or by what may be still better, the weakness and absurdity of his reasons.

These good effects are, it is manifest, both of them altogether distinct from the powers exercised by the jury in respect to the nature and effect of the decision. It is here accordingly meant to be preserved.

3. Another distinguishable mode in which the jury system, in the form in which it is in use, has been conducive to the ends of justice, is the causing evidence to continue to be received in the best shape; namely, that in which it passes immediately from the lips of the relating witness to the ears of the judge and the surrounding auditory, without being strained through the hands of professional or official instruments, or both, and then reduced to writing by them, they being paid all of them at the rate of so much a word for extracting it.

Neither is this feature inseparable in its nature from jury procedure. Neither in this instance is there anything in the nature of evidence on the one hand, or of jury procedure on the other, that renders it more difficult to receive evidence in this shape, in any other sort of judicatory than in that of which a jury forms no part. In relation to a fact open to dispute, no judge, no other ruling functionary that really wished to come at the truth, ever thought of receiving evidence in any other shape than in the orally delivered shape, whenever in this shape it was within reach. Witness all parliamentary inquiries: witness every father of a family in his dealings with his children or his servants; witness

the inquiries carried on, on the occasion of those crimes by which the minds of individuals, governors as well as governed, are apprehensive of injury done to person or property.

But except in so far as the truth was regarded as conducive to the giving effect to his power, or to that of him on whom he was dependent, no functionary concerned in the framing of the rules of procedure does ever harbour any such wish, as that of seeing the truth come to light, or enabling his associates and successors to come at the truth. Their aim has uniformly been, as it could not but be, to extract out of the pockets of suitors money in the greatest quantity in which it could be so extracted. The object was, that in testimonial statements the quantity of falsehood should be maximized — that further proceedings and further writings for the exposure of it might be necessitated.

At the time when the course of procedure with jurors in it was settled, and had assumed its form, scribes for the purpose were wanting, because the money to pay them had not yet come into existence. As yet judges were unable to receive evidence in any other than the most apt shape. But as the money came, things were set to rights by written compounds of falsehood and nonsense, which, under the name of pleadings, the parties were forced to utter, and to pay for, before the judges would suffer the matter to come before juries.

In the sort of judicatories in which the bench was not encumbered with any such appendage as a jury box, judges found themselves in this respect at their ease.

If in the presence of each other, and at the same time in the presence of the judge or judges by whom the fate of the suit was to be decided, the parties were heard in the first instance, the suit would in a great majority of cases be finished on that same sitting: and in the other cases, the speediest termination which the nature of the case admitted of would be brought to view by the exposition of the several facts. But in such a state of things, the pretence for official and professional extortion would have no place. In a case where property was the subject-matter of dispute, it became therefore a fundamental maxim, that in the presence of the judge or judges, on whose decision the ultimate fate of the suit depended, on no occasion were the parties to be suffered to meet in the presence of the judge: the parties being, unless by accident, the individuals by whom the facts in the case were in the largest proportion known, and in many cases the only individuals by whom any of those facts were known.

Upon the whole, then, two things appear sufficiently plain. One is, that the receiving evidence in its best shape is a practice that has obtained in all cases in which a jury has been called in: the other is, that the receiving evidence in this shape is an operation altogether as easily performed where a jury is not employed as where it is.

As to the quasi-jury system, the framer of it has nothing to get by any such mixture of absurdity and falsehood: accordingly, under the quasi-jury system, the evidence is received in the shape most conducive to the ends of justice.

One great and peculiar value of this plan will be seen to be its flexibility — its self-flexibility: with equal facility it will be seen applying itself to the most erudite and to the least erudite state of society: it might be employed not only in a democracy, but the most absolute despotism need not fear it.

Whatever be the effect of its influence, nothing can be more gentle and quiet, nothing else so gentle as its mode of action.

In the quasi-jury box may be seen a school in which the scholars are serving an apprenticeship in the art of judicature.

And these scholars, — in what number are they? Sooner or later they are the great majority of the whole number of those of whom the male population of the country is composed.

In England, under the existing system, every judge has an interest opposite to that of the people; and under the here proposed system, no judge has any other interest than that which coincides with that of the people. By no interest can he be led to wish to inflict punishment on any man, whom it could not be alike the interest and the wish of a jury to see punished.

Under this system, with what prospect of success could a judge pronounce a sentence or a conviction, which in his own eyes were unjust? Altogether unavailing would any such act be, except on the supposition of its passing without opposition through the censorship of the quasi-jury — and, moreover, finding a congeniality of guilt in the appellate judicatory. For the act being, in the eyes even of the agent, itself flagrantly unjust, is it possible that it should wear a more favourable aspect in the eyes of not only observers altogether impartial, but of jurors leagued by a community of interest, self-regarding and sympathetic, with the supposed objects of the intended injury?

To these safeguards is moreover proposed to be added that of an established delay, for the express purpose of giving time to all parties in any way interested, to make application to the appellate judicatory. Suppose, then, a sentence or conviction decidedly unjust, signed by the judge-immediate, what is the consequence? Before execution can be given to it, the whole country rings with denunciations of the injustice.

§ 6. *Difference between Jury and Quasi-Jury.*

In the framing of the proposed quasi-jury, the object has been, as already stated, to retain all the apt features of the jury institution, to discard the unapt ones, and to add such new features as seemed apt with reference to the ends of justice.

By *apt*, understand with reference to the here proposed institution; for one feature will be brought to view, to which the beneficial effects of the jury system will, it is believed, be in great measure referable; but from which, if adopted into the here proposed institution, no effects but evil ones could be produced.

Between the jury system and the proposed quasi-jury system, the principal difference lies in this: By a jury, powers are possessed and exercised, such as to a great extent are *decisive* of the ultimate fate of the suit: powers of acquittal, for example, in all criminal cases. To a quasi-jury, no such decisive power is allotted.

With the exception of an application which is not of the essence of the system, a quasi-jury has no decisive power, and in that case it is not ultimately decisive. Of this power the exercise consists in giving or withholding allowance to appeal from the immediate to the appellate judicatory, in cases where, if, without this restriction, the right of appeal were left to the defendant, a very prominent load of certain vexation and expense would be imposed on prosecutors, witnesses, and jurymen, — in cases where the instances of its being subservient to rectitude of decision would be rare in the extreme. These cases are criminal ones, in none of which appeal, on application by a jury or otherwise, is allowed by English law.

The reason of withholding from a quasi-jury the power possessed by a jury is this: — Under the proposed judicial system, the prevalence of sinister interest on the minds of the judges is opposed by checks much more efficient, it is believed, than any which have been or can be opposed to it in the breasts of jurymen; namely, in the first place, sinister interest — the great cause of moral inaptitude in the case of judges: in the next place, relative and comparative deficiency in respect of intellectual aptitude — a branch of appropriate aptitude in which it is not in the nature of the case that these ephemeral functionaries should in general be able to compete with judges.

With the above exception, the character possessed by the quasi-jury partakes more of that of a section of the public opinion tribunal, than of that of a body of commissioned and official judicial functionaries.

That decisive and virtually negative power which is apt in a jury, but which would be unapt in a quasi-jury, being thus excepted, the features to which the jury institution is indebted for its aptitude, and which are here adopted and given to a quasi-jury, will be found accidentally only, not essentially, belonging to it.

These are — 1. The end to which the institution of this fraction of a jury is manifestly and confessedly directed; namely, serving as a bridle to the power of the creature of the monarch — the judge.

2. The publicity of the proceedings wherever this committee of the people at large makes its appearance.

3. The task which their power imposes upon the judge — the task of giving a public and immediate explanation of the case, with the reasons on which his expectation of seeing any course he would wish them to pursue pursued accordingly, rests.

4. The shape in which the evidence presented to this compound judicatory is always presented.

Of all these four features, no one can be assigned, which in the nature of the case might not have place in a judicatory constituted in any other manner, as well as in a judicatory of which a jury forms a part. For publicity might have place in a single-seated and uncompounded judicatory, as well as in that of a compound one; so likewise might the evidence be given in the best shape: the task of giving explanation and reasons to the auditory might be assigned to the judge, so there were but an auditory, no matter how composed; but unless along with the task, adequate motives were given for the performance of it, the task might as well not be given: these motives are not wanting in the case of a jury, nor will they be found wanting in the case of a quasi-jury.

Accidental as they are in their nature, with reference to the use made of this fraction of a judicatory in English-bred procedure, yet, but for the establishment of this institution, these vitally essential features would naturally have been as unknown in the English, as they are in the judicial systems of most other countries. But the point is scarcely relevant. The proper question here is — not what has been, nor what might have been, but what ought to be.

§ 7. *Collateral advantages or beneficial applicabilities, two.*

I. Its operation in the character of a school of justice.

II. The universality of its applicability — its fitness for being inserted into the judicial system under any form of government.

I. As to its operation in the character of a school of justice.

Compared with the jury system, this character is not peculiar to the quasi-jury system:

only in a degree, but not on the whole, is this character peculiar to it. In this respect its advantages over the jury system are these:—

1. The superior magnitude of the population drawn into this school. Under the here proposed system, the subdistricts constituting the judicial districts of the immediate judicatory are more numerous than those from which, under the English system, juries are drawn.

For the avoidance of vexation and expense, the number of members proposed to be given to a quasi-jury is indeed considerably inferior to that which has place under the jury system; but the defalcation from this source is supposed not to be equal to the addition made from that other source.

2. The greater probability of a superior degree of attention being given to the subject-matter of the exercise in the quasi-jury school, compared with the jury school. In the jury school, what is done is principally done by the scholars together in a body; and though in their individual capacity there is nothing to hinder them, neither is there anything to invite them to interpose; in general, the foreman, or some other member (naturally the foreman,) takes the lead; and the giving an unreflecting assent is all that is done by the rest.

3. The indiscriminating miscellaneousness of the composition in the case of the proposed quasi-jury, compared with the sinister selection, which in all places, and at all times, is capable of being made in the case of the jury.

4. The condition of comparative freedom, and unembarrassed capacity of attention, in which, in the case of a quasi-jury, the minds of the members would be placed, in comparison of the inward sense of responsibility and concomitant embarrassment, which to a considerable extent may be apt to have place in the case of a jury, where the fate of the suit and the conditions of the parties to it is dependent on the verdict in which they join; particularly in the case where the eventual punishment rises to a certain pitch of severity, and more especially where death enters into the composition of it.

5. In the jury school, the head-master is a functionary whose lessons are by the nature of his situation kept in a state of perpetual opposition to the universal interest; in the quasi-school, he is a functionary whose lessons are by the ties that have been brought to view kept in a state of continued conformity to that same only right and proper standard of rectitude.

II. Now as to the universality of its applicability.

A popular government is the sort of government for the use of which it has been framed: of its applicability, its usefulness, and capacity of being employed in such a government, such proofs as have presented themselves have just been seen. But governments there may be, into which, though altogether despotical, the quasi-jury not only would be useful if admitted, but might even stand, as it should seem, no mean chance of being admitted; while by the absolute power which, in cases of the highest importance, the jury has over the result of the suit, all chance of its admission may stand eventually excluded.

Two ways there are, by which, disjunctively or conjunctively, the reconciliation between the systems of evil and this instrument of good might be effected.

1. The one is — the exclusion of this bridle on the powers of the judge from those suits on the occasion of which the opposition between the interests of the subject many and that of the ruling few is brought into exercise.

2. The other is — the composition of it in such manner as to prevent it from thwarting the views of the compounders.

On the other hand, what cannot be concealed is — that in a government the object of which is to keep or reduce the intellectual part of the mind of its subjects to the condition similar to that of the higher order of quadrupeds, and at the same time the sensitive part to a worse condition, no such institution as that proposed could stand any chance of being admitted: the design of it would be too palpably adverse to the design of the government.

The government of British India may serve for an example.

1. With the exception of the many-seated judicatories framed upon the Westminster-Hall model, single-seated judicatories are secured by necessity, a stronger power than choice.

2. On behalf of the natives, it has no aversion to security for persons, to security for property, nor even to increase of property, so as the value of East-India stock, but more particularly so as East-India patronage be not diminished.

3. Understanding that the increase of national wealth depends in no small degree upon the security of property as against unlicensed malefactors, it has no objection to the most perfect degree of security for property against all depredation from which it derives no profit: so as the maximum of all depredation, out of which it sees a capacity of extracting profit for itself, be secured to it.

4. The power of authorizing appeal not being, according to the here proposed plan, extended beyond those offences, which while they are most frequent, inspire most terror to individuals, would not give umbrage to government: nor, how beneficial soever, is it an essential feature.

A form of government not essentially different from that of the Anglo-American United States, but regarded as in a still higher degree conducive to the only proper ends of government, is that for the use of which the institution in question was devised. But if well adapted to the proposed form of government, not less so would it be to that of the so happily established one. Under that government, the jury, with its absolute power, has not the least tendency to become destructive: but an effect which to a considerable extent it cannot but have is, — the weakening it, — the weakening it, namely, by the chances of escape which, in the case of guiltiness, it affords in the instance of the classes of crimes which, while they are so pregnant with evil to the person and property of individuals, are in so high a degree more frequent than all other crimes.

For the absolute power of a jury it has no use. In that seat of popular government there are no attacks upon the liberty of the press, or liberty of public discussion; — no secret confederacies for producing changes in government; — no conspiracies against government, organized by government itself for a pretence for making oppression still more oppressive. In that seat of frugality and equality, there is no propensity among jurymen to favour those practices by which the revenue of government is diminished. A United States jury has no government extortion or oppression to avenge: proportioned to the defalcation from the public revenue by the success and increase of smuggling, would be the injury to themselves: the produce of the taxes is employed, the whole of it, in the service of all: no part of it is put into the pockets of the imposers.

With reference, therefore, to any government having for its end in view the greatest happiness of the greatest number, its aptitude consists in its want of aptitude with reference to any government that has for its ultimate end in view the maximization of the happiness of those who share in it, and for its mediate, or at any rate its collateral end, the minimization of the happiness of all who are subject to it.

§ 8. *Jurisdiction.*

Question 1. Why to the power of a quasi-jury give the same all-comprehensive extent over the field of law, as to that of the judge, in respect to the species of causes?

Answer. — Reasons: 1. Because, if on any part of the field of law a sufficient demand for that institution has place, so has it in every other. True it is, that in the penal department, especially those cases in which application is made of the highest punishment, the demand is much more urgent than in the non-penal department, generally considered. But as to the non-penal department, if in any part of it the institution be preponderately useful, it rests with those by whom its title to all-comprehensiveness is disputed, to say at what point its utility ceases: and this will, it is believed, be found impossible.

2. Whoever it be to whom the institution of a jury, on the footing on which it stands at present in England, is an object of approbation, — if the question were put to him, what consideration that approbation has for its grounds, his answer would probably be, the operating as it does in the character of a check and bridle to the power of the judge. But for this security against misdecision, if any sufficient demand has place in any part of the non-penal department of the field of law, impracticable will be the endeavour to find any other part in which an equal demand has not place.

The incompetency of a jury under the English system in all causes of complexity has been already shown: that incompetency being greatly enhanced by those features of deficiency, the exclusion of the parties from the theatre of justice, and the inability of a party on either side, either to furnish his own relation in support of his own demand, or to call upon the other party for his.

These deficiencies had their origin in the artifices of the judges and other lawyers. In the Saxon time, and for a long time afterwards, the cast of the system was altogether popular. The locatee of the king presided, but the judges were all who were not in a state of slavery. In a judicial assembly in which, when all non-parties were present, so of course would be all parties, in so far as it was in their power. Each would be eager to tell his own story — each would be no less eager to extract matter of the like tendency from his adversary. In this way, the same meeting that gave commencement to a suit would commonly give termination to it. So it is at this day in those judicatories which are permitted to have existence for the recovery of small debts, and in those days scarcely were any suits known that would not now-a-days be regarded as small-debt causes. Such a state of things was too favourable to justice to be endured by lawyers.

In those days the judicial districts were small, and in the same proportion numerous After the Norman conquest, judicatories were established by the king, each of them having, for certain purposes, jurisdiction over the whole kingdom. The whole kingdom was in this way converted into one vast judicial district — the communication at the same time difficult to a degree at present not easily imagined: and by the barbarity of the times, insecurity was added to difficulty. Under these circumstances, few but would find their con-

venience in being permitted to attend and plead by deputy. Under the name of attorneys and serjeants, a set of professional lawyers was thus formed, who became partners in the sinister interest of the judges by whom the system of procedure was framed; and it was out of the order of serjeants that men were taken to fill the judicial benches.

In this state of things, the carrying to the highest pitch the aggregate mass of delay, vexation, and expense, became of course the ruling object of the partnership in all its branches: expense for the sake of the profit extracted out of it; delay and vexation for the sake of the addition which those evils made to the expense.

A law-book, written in the time of Henry the Second, is to this point very satisfactorily instructive. It had for its author no less a man than the Chief Justiciary Glanville, the head man of the law. In profession it covers the whole field of judicature. It is occupied almost exclusively with forms of excuses for non-appearance. These excuses were already reduced to a system. Of the different species of causes as determined by the nature of the service demanded, scarcely is anything to be found: as little of any stages through which the business of judicature had to pass. An obvious inference — and it seems an incontrovertible one — is, that when once the parties were brought together in face of each other and of the judge, the matter was as good as settled: it was settled as in our day a tradesman's demand of payment for a few shillings' worth of goods is here and there in a small corner of the country allowed to be settled.

For both these deficiencies Rome-bred law presented a ready-made supply. To jurymen called from all parts of the kingdom — in some cases to the metropolis, in others to the ever-varying residence of the monarch — called from all parts, and consequently in a large proportion from parts at the remotest distance from their respective homes, — the attendance of a few days sufficed to constitute an enormous burthen. Those by whom Rome-bred law was imported from Rome to England, required not in their judicatories any such incumbrance as a jury-box: provided with a quantity of ready-made power, they knew well how to fill up any vacuity that could be imagined. Sitting without intermission, with hands open for fees, and ready to close upon them at whatever time and season offered, no causes could be too complex for them. At one grasp they took possession of the whole mass of moveable property throughout the country, as it became vacant by the death of the respective owners. Object they had no other than the application of it to pious uses: but of all imaginable uses, none could be more pious than their own.

The policy of the learned fraternity, as above, had kept the suitors out of the only place in which they could either deliver or extract from others *vivâ voce* evidence. Glad of course would they have been to have extracted it in the written shape: for when words are once designated by visible and permanent signs, they became capable of being taxed. But in this form, for several centuries they were not able to extract them: the original structure of this judicial system had not furnished machinery adapted to this purpose: small was as yet the number to whom it could be applied. Meantime their learned rivals and competitors were on the watch: no sooner was the supply of writing found sufficient, than they stept in, and applied it to their use.

To all who had anything to ask of them, those judicatories were open. They received petitions; furnished persons (who after telling their story upon paper were ready to give expression to them) with such questions as a person might wish to receive answers to, from those at whose hands he demanded them; and applied the whole force of their authority in exacting those answers, without which the questions would have been of no use.

Question 2. Why, in each suit, seek to render the authority of the quasi-jury co-extensive with that of the judge?

Answer. — Reasons: 1. For a reason similar to that mentioned in answer to Question 1. If in any one stage requisite, so in every other. In each stage the demand is the same as in every other: in each stage the temptations to which the probity of the judge stands exposed are the same.

2. To the unobligativeness of the authority here given to the jury, are the interests of justice indebted for the practicability of giving this extension to the application made of this check.

From the absolute power of frustrating the exercise of the power of the judge, and this in every one of the numerous stages which a cause, in a certain degree complex, must of necessity go through, a mass of confusion, and thence of injustice, beyond all power of calculation, might be the results. But forasmuch as, with the exception of the power of allowing or disallowing appeal in certain criminal cases, no obligatory power is here given to this section of the public-opinion tribunal — in a word no functions other than the auditive, interrogative, and censorial functions — hence it is, that from the magnitude of the extent given to its authority over the whole course of the suit in the way to its conclusion, no such nor any other evil can arise.

In the English system, whatever be the number of sittings in the course of which, on some occasion or other, a suit comes upon the carpet, — some of those sittings being in public, others in the closet of the judge, or of

this or that one of his subordinates, — only in one of those sittings is a jury introduced.

Question 3. Why is not the authority of the quasi-jury here extended to summary sittings, nor thence to any summary suits?

Answer. — Reason: 1. Apprehension of the extent of the demand for individuals to act as quasi-jurymen, were such extension given, and thence of the mass of attendant vexation and expense.

In the case of *appointed* suits heard at the appointed sittings, measures can all along be taken, namely in the preparatory summary sittings and hearings, of the quantity of quasi-jury time necessary to be applied: and of the appointed days, the place in the calendar may be fixed, and in so far as the judge-principals have power insufficient, judge-deputies provided accordingly. Not so in the case of the summary suits.

The power of the judge is not by this omission left without check. In the first place remains the check imposed by the body of visitors, for the maximization of which arrangements have been made elsewhere.

In the next place comes the power of appeal here provided. This appeal is not from the judicatory of a subordinate to a superordinate judicatory, but from one judge to another, or even the same judge at another time: at which other time the quasi-jury will form a part of the judicatory, and thus the delay and expense attached to local distances will not be incurred. Whether, on the second and more deliberate hearing, the judge shall be the same or a different one, must, it should seem, of necessity be left to the discretion of the judge. If at the summary sitting the judge was a judge-depute permanent, the natural course would be, that at the appointed sitting it should be the judge-principal: the opposite course would be a sort of anti-climax. But it is only by necessity that the judge-principal stands excused from serving on the summary as well as on the appointed sittings: and so far as he does thus serve, the appeal thus made must be either to his virtually subordinate substitute, or to himself.

In the appeal *ab eodem ad eundem*, there is not in this case either absurdity, danger to justice, or even innovation. In English equity procedure, what is called a rehearing is no uncommon incident. True it is, that in one case of a rehearing, the appeal is in effect and fact from the first judge to a different one. This case is that where (a change in the situation of chancellor having taken place) the appeal is from the former chancellor to his successor. But another case of a rehearing is, where, at the instance of a party, the same chancellor hears a second time arguments on the same subject-matter as on the first.

In this case there is no fraud; all is what it seems to be. The fraud is, where the appeal is from the chancellor himself, to a judicatory of which he is not only a member, but the only thinking one — a judicatory in which, on ordinary occasions, none attend except two cyphers, who vote as they see him vote, without the pretence of thinking: on other occasions, none attend but the few sent thither by some latent interest, which, if made apparent, would show them to be each of them judge in his own cause.

"But," says somebody, "you, in whose eyes these same individuals are not unapt to bear a prominent part in the business of legislation, on even an unbounded scale, — can you, with any consistency, regard them as unapt with regard to a function so limited in its extent, so subordinate in its importance, as that of pronouncing a *yes* or *no* in a case where nothing more is at stake than the fate of this or that individual?"

Answer: 1. In regard to the power I give to them, — it is under the pressure of necessity that I give it to them, because in no other hands could it be reposed without the absolute certainty of its being abused.

2. In the case of the power given to them as to the choice of legislators (in no instance whatever is any power of legislation given to them,) I leave them — as according to all experience I may without danger leave them — to be assisted, and, in as far as they please, guided by general reputation: no opinion, no judgment of their own, are they in that case called upon to pronounce. But in this case, no judgment can any one of them pronounce which is not his own: no less direct and complete is the cognizance taken of the matter in their situation, than in his situation is that of the judge. In the forming of it, no assistance have they that so much as professes to be impartial, other than that of the judge — of that very functionary, to whose power the one and sole use of them is to apply a check — and under whose guidance, in so far as, without forming, in relation to the matter in question, an opinion of their own, they commit themselves, their function is inefficient and useless.

§ 9. *Interrogative function.*

Persons to whom, with a view to the ends of judicature any member of the quasi-jury is authorized to address questions, are in general all other actors on the judicial theatre.

In particular, they are as follows: —

1. Any party to the suit on either side; to wit, whether in his quality of party interested, or in his quality of party testifying — or in other words, litigant witness.

2. Any extraneous witness.

3. Any assistant, non-professional or professional, of any party on either side.

4. The pursuer-general, or any depute of his, if present, whether by office engaged in the particular suit in question or not.

5. The defender-general, or any depute of his, whether by office engaged in the particular suit in question or not.

6. The registrar or his deputy.

7. Any fellow-member of the same quasi-jury.

8. The officiating judge, whether principal or depute.

Correspondent to the interrogative function on the one part, is the responsive function or service on the other: of an exercise of the interrogative function on the one part, the object is, to produce an exercise of the responsive function on the other.

To render obligatory the exercise of the correspondent responsive function, the following are the qualities which must have place on the part of the discourse uttered in the exercise of the interrogative function:—

1. It must be relevant; it must bear some assignable relation to the matter in question.

2. It must be apt; it must be such that an answer given to it may be eventually in some way or other conducive to the ends of judicature; it must not be frivolous.

If being neither irrelevant nor otherwise unapt, the interrogation addressed is followed by relevant and apt responsion, it is well. If being addressed to a person other than the officiating judge, and being in his eyes relevant and apt, such responsion as in his judgment is relevant and apt fails of being given to it, — the judge will apply his power to the exaction of such answer, according to the situation of the non-complying individual.

If it be a party, he will give him to understand, that of non-compliance the effect may be the loss of the suit: that is to say, if it be on the pursuer's side, the non-performance in the whole or any part, of the service demanded by the suit; if on the defender's side, the rendering of such service in the whole or in part, in so far as the rendering it will be at the expense of the non-complier: and such, accordingly, in the case of necessity, is the arrangement that may be made.

If it be an assistant, professional or unprofessional, of a party, and in the declared opinion of the judge such non-compliance has for its cause (especially if it be in concert with the party) the endeavour to save a party, he being in the wrong, from loss of suit as above, intimation may be made to him, that in relation to the interest of the party in the suit, such non-compliance will have the same effect as if it had been by the party himself that it had been manifested: and such, accordingly, in case of necessity, is the arrangement that may be made.

If it be a pursuer-general, or defender-general, or the registrar, or their deputes respectively, the judge will cause make a minute *in terminis*, of such discourse as by the several persons who took part in it was employed; which minute will constitute an article in the incidental complaint book.

So if it be a fellow-member of the quasi-jury.

So if it be the officiating judge.

§ 10. *Opinative function.*

The judge's recapitulatory statement, opinative decree, and imperative decree, having been delivered, — thereupon comes the quasi-jury's function — the opinative function, having for its subject-matter the two above-mentioned decrees of the judge. Of this function the exercise is, in the nature of the case, susceptible of any one of the following shapes, and in any one of these shapes they are equally free to exercise it: —

1. Express refusal to pronounce any opinion.

2. Consent to the whole, tacitly given.

3. Consent to the whole, expressly given.

4. Dissent to the whole, expressly given, but without proposal of substitute or amendment.

5. Dissent to a part, expressly given, but without proposal of amendment.

6. Dissent to the whole, with proposal of substitute.

7. Dissent to a part, with proposal of amendment.

The opinion of the quasi-jury being in one or other of these shapes made known, entry is accordingly made on the record by the registrar, stating the shape in which it was so made known: silence, after presentation of all these several shapes to their option, and a sufficient pause for the expression of it, — silence being taken for tacit and universal consent.

If to the whole, or to a part, any substitute or amendment is proposed, the judge either assents to it, and changes or amends his decree or decrees accordingly, or declines doing so: in either case, entry accordingly is made on the record.

In the three first-mentioned cases, — namely, express refusal to pronounce opinion, consent tacit, and consent express, — execution in virtue of and conformity to the judge's imperative decree, unless appeal be made, follows of course.

In the four last-mentioned cases, unless appeal be made, it rests with the judge to cause execution to have place: if appeal be made, it takes its course in these four cases, as it would have done in any of the three first.

As to the appeal, in what cases it shall, and in what cases it shall not have the effect of obliging the judge-immediate to stay execution, will be found determined, regard being had to the several particular cases in the penal and non-penal codes.

If from non-compliance with any substi-

tution or amendment proposed by a quasi-jury, irreparable damage will ensue, while from compliance equiponderant damage will not ensue,—the judge will in this case regard himself as bound to make exercise of his suspensive, or say execution-staying function, to that effect.

Only in the case of its being the act of the quasi-jury in its collective capacity, can entry be made of dissent in any one of its four shapes as above; but the act of the majority of the jury is the act of the jury — of the jury in its collective capacity.

To a minority of the jury on this occasion, as to all persons on all other occasions, the press is open for the reception of the free expression of their sentiments.

On being thereto requested by the quasi-jury, the pursuer-general present is expected to lend his assistance to the purpose of giving apt form to any such proposed substituted decree or amendment, as above.

So, the defender-general.

Under the dominion of unwritten law, called also jurisprudential law, the question of law to be determined is — what, on the individual occasion in question, are those terms of the law which (in default of all relevant law made by the legislature) may with most propriety, as if it had been made by the legislator, be made by the judge — as being most analogous to the tenor of the rule of action which has place in the political community in question — statute law and jurisprudential law taken together.

The question of fact is either an absolute question or a comparative question. A comparative question is a question concerning degree; an absolute question of fact is every question in which the consideration of degree has no part. Degrees are either degrees of quantity or degrees of quality. Degrees of quantity are no otherwise determinably expressive in any absolute form than by numbers. Every absolute question of fact may, without regard to quantity, be so worded as to be susceptible of a true answer, either by a *yes* or a *no*. A question concerning quantity admits of as many answers as there are degrees in the scale in question, numbers, or series of numbers, contained in it, of which it is assumed that on the occasion in question some one or other is the proper.

A question, the answer to which is either *guilty* or *not guilty*, is a question concerning law and fact combined. In the answer expressed by the word *guilty*, two assertions are contained; namely — 1. The individual in question, at the time and place in question, or at any rate at some time and place, did perform a certain act, positive or negative. 2. The act performed is of the number of those which stand interdicted by some portion of law, namely, legislatorially existing law, or by the judge in question may and ought to be considered as interdicted by a portion of imaginary law, to be made by him for the purpose.

Examples of scale of quantities: — 1. Money: as where a fixation is to be made of the sum to be transferred from a defendant to a pursuer, in compensation for loss or injury; or from defendant to the public, in the name of punishment.

2. Time: as when, in case of chronical punishment, a fixation is to be made of the length of time during which it shall continue: say banishment, confinement, imprisonment.

§ 11. *Warrant for Appeal.*

If to a set of men thus composed, any determinately efficient power be fit to be given, a case in which it may be of use to give it is, the giving admission to the faculty of appeal, divested of the inconveniences naturally attached to it, in those criminal cases in which, if left at the option of the defendant, it would be sure to be made by all who were guilty, and in so far produce much vexation to the injured, without benefit to the criminal. Among these are such as are at the same time of the most mischievous kind and the most frequent occurrence: in particular, offences of the predatory kind, when committed by habitual, and as it were professed depredators, especially if accompanied with homicide, housebreaking, or personal violence or menace.

In a case of this sort, appeal, if allowed, will come in a manner of course: it will come for the sake of the delay applied to the punishment, and the chance which all delay affords, or appears to afford, of ultimate escape.

But by every appeal, suffering is by the innocent and injured almost constantly experienced. Under the worst system in existence, the instances in which a person really innocent is condemned, and in consequence of condemnation actually made to suffer punishment, are probably, comparatively speaking, very rare: rare even under the system of secret procedure acted upon in despotic states; still more rare under the system of publicity which has place in England, and elsewhere under English-bred law. Under the here proposed system, with such checks as are here applied to the purpose of securing moral aptitude on the part of the judge, they may, it is hoped, be reasonably expected to be still more so.

At the same time, a state of things, in which it lies in the absolute power of a single person in the situation of judge (even with his moral aptitude thus checked and guarded) to subject a human being, perhaps innocent, to the extremity of allowed punishment, is a state of things which to a human mind cannot but present considerable alarm.

But the state of things in which claims of this sort are not only so probable, but so extensively felt, is a state of things which, under a system of which the present proposed code forms a part, would scarcely in any instance have place. This state of things is one in which punishment, in its nature absolutely irreparable, is lavished, either with the most savage and deliberate cruelty, or with the most thoughtless extravagance. There is but one mode of punishment, the mischief of which is absolute and totally irreparable — and that is mortal punishment.

For argument's sake, instead of mortal punishment, suppose even mutilation employed, — mutilation even in parts or organs more than one. Not altogether unsusceptible of reparation would even this punishment be: for, for suffering in this shape, reparation, and to a very wide extent, is almost everywhere actually in use: witness this, in the pensions granted in the sea or military service; and it is a matter generally understood, that by the individuals by whom on this account reparation in this shape and degree is received, it is not unusually regarded as adequate; insomuch that if asked, whether for the same reparation they would originally have been content, or would now, if it were to do over again, be content to be subjected to the same suffering, the answer would be in the affirmative.

The temperament here proposed is accordingly, that in such instances, in regard to those criminal cases of the higher order which are of the highest degree of frequency, appeal should not in general be admitted: but that, on a certificate given, either by an entire quasi-jury, or by a portion of it, or say perhaps, in some cases, even by a single quasi-juryman, that in his opinion innocence is certain, or culpability doubtful, appeal should be allowed to be made.

Of an arrangement of this sort, one effect, it cannot be denied, would be the putting it in the power of a criminal, by means of a bribe given to a quasi-juryman, or to the number of quasi-jurymen in question, to obtain a certain quantity of delay in the execution of the sentence.

Of appeal in highly criminal cases, in general, what shall be the effect? The appellate judicatory — shall it pronounce its decree upon the bare view of the evidence, as reported from the immediate judicatory? — shall it, of course, try the cause over again, by hearing evidence as if none had before been given? — or shall it have the option between the reported evidence and the giving a fresh hearing to the evidence? On the choice between these three courses, it is manifest how much would depend, and how considerable between them respectively might be the difference in point of effect.

So likewise as to the nature of the offence, — whether it has or has not anything in it of a constitutional character.

§ 12. *Costs of quasi-trial.*

Of the quasi-jury, the expense taken in all its parts is very considerable: it is composed of the evils correspondent and opposite to the collateral ends of judicature, namely, delay, vexation, and useless expense.

This considered, two consequences follow: —

1. One is, that when, in the judgment of those who have any interest in the suit, this check with its expense is needless, the expense ought not to be incurred.

2. Another is, that in so far as the evil consisting of the expense is preponderant over the good consisting in the security, neither in this case ought it to be employed.

Hence a proposition which may naturally enough appear incontrovertible at first sight is, that if no one of the parties conceive himself to have any ground of complaint against the conduct of the experienced judge, there can be no use whatever in clogging the operation by a multitude more or less considerable of unexperienced ones.

If to the justice of these observations there be anything to oppose, it must be on this ground, or some such ground as this, — namely, that by reason of the relative ignorance and inexperience of a party, it may happen, that though the conduct of the judge has been unapt, and that to such a degree as to have been productive of misdecision to the injury of the party in question, yet by reason of his own relative inaptitude, it may be out of his power to determine, whether in that same conduct there has been or has not been anything unapt; or else, that by timidity — by fear of incurring the resentment either of the judge in question, or of the class of men to which the judge belongs, he may be effectually prevented from availing himself of any such security as that in question, supposing it here to have given him the faculty of employing it; or, lastly, that by indigence, it may happen to him to be incapable of making use of it.

To the order for quasi-trial, the judge adds, in relation to the expected costs thereof, such order as the nature of the case — consideration had of the pecuniary circumstances of the several parties — appears to him to require. The options are as follows: —

1. He leaves the burthen of costs in its natural seat; leaving it to each party to bear his own part of it.

2. In case of need, he requires a party or parties on one side, to make advance of money on this account, in any proportion, in favour of a party or parties on the other.

His care will be, not to suffer the additional delay, vexation, and expense, to be employed

by the party who can best endure it, as an instrument for the oppression of one who can least endure it.

§ 13. *Features in jury-trial here discarded.*

First come the features of jury procedure; and under the head of each of them the opposite state of things here will be briefly undernoted.

These may be distinguished into such as are regarded as being productive of evils opposite to rectitude of decision, the main end of justice — and such as are regarded as productive of evils opposite to the collateral ends of justice, namely, needless delay, vexation, and expense.

1. In a jury, number of persons twelve. In a quasi-jury, not more than three.

2. Of a jury, on failure of instantaneous agreement, forced transference to a closed room: no other persons present at their deliberation. Of a quasi-jury, no such transference, unless they desire it, or one of them desires it.

3. In the case of a jury, immediately before the commencement of the hearing, — a solemn promise exacted of each, to declare an opinion on one side of the question, whatever it be, or on the other side. On the part of a quasi-jury, no such promise is exacted or received.

Note that, on every question in relation to an opinion, and that which is in contradiction to it, the possible states of the mind are three; namely, decision on the affirmative side, decision on the negative side, and indecision: and of this last state, the exemplification will be the more frequent, the less the degree of instruction is on the part of those to whom the question is put. As for example, speaking of an individual in the character of defendant in a penal suit, questions no more than two: Is he guilty?—or, Is he not guilty? Answers which the nature of the case admits of, three; namely, Guilty, *i. e.* my opinion is, that he is guilty. — Not guilty, *i. e.* my opinion is, that he is not guilty; or, I have not been able to form an opinion whether he is guilty or not. Of the real state of the man's mind, one or other of these answers cannot fail to be the true expression. The true one will be this third state, as often as the same opinion fails of being entertained by all of them, unless a decided disagreement has place — one or more entertaining the positive opinion, the other or others the negative. But for this absence of all opinion, frequent as it cannot but be, the law has not provided any expression: the consequence is, that in the instance of every one of the jurors who has found himself unable to form a decided opinion on either of the two opposite sides, the promise which the law has forced him to make is violated.

To the conception of the founders of Roman law, this natural state of the mind had presented itself: a form of words, namely, *Non liquet*, had accordingly been provided by them for the expression of it. But obvious as is the conception, on the part of the founders of English law in this particular, the state of mind was too barbarous to admit of it. No distinction did they know of between decision and indecision. As little perceptible to them was the distinction between unconscious and self-conscious misdecision — between blameless error and intentional injustice. Supposing the decision erroneous, the conclusion was, that those who joined in it could not but be conscious of its being so. Accordingly, by the verdict of a second jury, to punish the first jury with one and the same punishment in every case, and that a punishment involving utter ruin, was a practice as common as that of simply sending the original suit to a second jury is at present.

4. A declaration of an opinion on the one or on the other of the opposite sides of every question (except in the case of a special verdict) — which declaration is consequently — on the part of every one whose opinion fails of being exactly the very opinion declared as and for the opinion of the whole — false: and the correspondent promise violated.

In cases styled *civil*, a verdict styled *special* is admitted. But in cases styled *criminal* (not to speak of those styled civil,) no such verdict can, without the concurrence of the judge, be admitted: and in this case, too, of a special verdict, the same declaration of unanimity as in the case of a general verdict is indispensable.

In speaking of the verdict of a jury, the language universally employed is, as often as any such difference of opinion has place, undeniably false: what is said is, that it is unanimous; that is to say, that they are all of one mind. To render the expression true, it would be necessary to substitute to the word unanimous, some such word as *univocal*, all of one voice — all joining in the voice of the foreman, where, as for example, in a case called criminal, the words he pronounces are, *guilty*, or *not guilty*.

In the case of a quasi-jury, no such univocality is exacted.

5. To the promise thus made — the promise made by every man, that his opinion shall be the same as that declared by the foreman, is attached a religious ceremony, by which it is converted into an oath. The ceremony consists in a man's saying, *So help me God*, and thereupon kissing a book, which for this purpose has been put into his hand.

The promise having been thus converted into what is called an *oath* (though with more propriety it might be called a *vow*,)

every violation of it is thereby converted into an act of perjury.

In the case of a quasi-jury, no oath is administered; no perjury therefore can have place.

6. In case of disagreement, confinement inflicted on all, until a universal declaration of agreement has been produced on the part of every one of them: confinement accompanied with circumstances of unendurable and consequently never endured affliction, such as convert it into torture. Torture-master, the judge: the torture being continued till they all join in declaring an opinion dictated by him, or in his default, any one of the jury — until they all join in that one of the two decisions which is dictated by him.

If the verdict they come out with is not agreeable to the judge, he sends them back again till they are agreed; and this he does as often as he pleases. Of late, the functions of torture-master in this way have not frequently been performed by the judges: but there is nothing to hinder it, and it may be administered for any length of time.

Whether this function be or be not administered by the judges, it may on any occasion be administered by any one of the jurymen to all the rest.

The ceremony is to make every one of them keep his promise: the torture is to make some of them break it. The torture has always been more powerful than the ceremony. So plainly irresistible is the possible amount of it, that the actual scarcely ever amounts to anything more than a comparatively slight temporary uneasiness.

Thus it is, that for making eleven good men and true (for such is their appellation) perjure themselves, the equivalent of the prick of a pin suffices.

In the case of the quasi-jury, production of perjury being no part of the danger, neither in that shape nor in any other — neither by the judge nor by a quasi-juror, is any such function as that of a torture-master's allowed to be exercised.

7. Concealment of what passes — concealment from all but the patients, while the torture is at work. The time is supposed to be passed in deliberation: but for this supposition, however, the nature of the case furnishes not any apparently strong ground. If the contest were a contest between understanding and understanding, yes: but the understanding has nothing to do in the business; the contest is between will and will; the question is, who is likely to endure the inconvenience? for whoever it be by whom it is longest endured, by that one are the terms of the verdict determined: the victory is to him by whom the part of an obstinate man is acted with the most success. To the arguments urged by professional advocates on the part which he espouses, it is not likely that under such circumstances any material and efficient addition should be made by him whose determination is to conquer or die.

In the case of the quasi-jury, of course no such concealment can have place.

8. Responsibility to the power of the legal sanction excluded altogether: punibility, none.

A quasi-juror is, in case of self-conscious delinquency, punishable.

9. Responsibility to the public-opinion tribunal, if not excluded altogether, minimized: nothing but the bare verdict, guilty or not guilty, being exposed to the public eye. The grounds of it being thus covered by impenetrable darkness, what blame can under such circumstances be passed is, in the instance of each one, reduced to next to nothing, by the multitude of those amongst whom it is shared.

Could but the light of publicity, by some such power as that of the Devil upon two Sticks, be regularly thrown upon the business of this well-closed theatre, the scenes that would be exhibited would be such as would be enough to dry up the stream of eloquence now so perpetually poured forth upon this matchless fruit of the wisdom of English ancestors. This, however, is physically impossible. Laid open indeed to the public might everything be that passed; but the scenes which in that case would be exhibited, would have little resemblance to those which have place among a set of men, in whose instance the sense of common distress and common weakness could scarcely fail to be productive of mutual indulgence and prudential silence. Out of a school thus circumstanced, tales of ridicule are in little danger of being told.

In the case of a quasi-jury, in the instance of any one of its three members, to whose mind an observation which he is desirous of communicating to his colleagues has presented itself, — if it be the pleasure of the others to hear him, they retire for that purpose. In the judicatory itself they cannot continue, because that would be incompatible with ulterior business. A retiring room is provided for them; and as to the giving admission to such other persons as the room will hold, the difference between the giving and withholding it, does not present itself as being of much importance.

CHAPTER XXVII.

RECAPITULATORY EXAMINATION, OR QUASI-TRIAL.

In certain cases, superadded to the usual examination of the evidence, is another, styled a recapitulatory examination, in which cases the preceding examination is for distinction's

sake styled the original examination. Synonymous to recapitulatory examination is *quasi-trial*, as being before a quasi-jury.

At the recapitulatory examination, whatsoever evidence was received in the course of the original examination at one or any greater number of sittings and hearings, is received a second time, and if possible altogether, at one and the same sitting; no adjournment being made, unless at that sitting the time capable of being employed at one sitting be exhausted.

At the recapitulatory examination, no evidence is received which was not received at the original examination.

At the recapitulatory examination, the question of law may, at the desire of a party on either side, be reconsidered.

The original examination was performed by a judge acting singly. No recapitulatory examination is performed except before a quasi-jury. The judge has them for assessors. To bring the suit under the cognizance of this section of the public-opinion tribunal, is one principal purpose of this second examination.

Exceptions excepted, by what judge soever, whether principal or depute, the original examination was performed, so may the recapitulatory.

The cases in which a recapitulatory examination has place, are the following: —

1. Where, for his own satisfaction or that of the public, the judge himself desires it: for his own satisfaction, to wit, that the several portions of evidence which had been received on the original examination may be re-exhibited, confronted, compared, and reconsidered.

2. Where, on either side, any party is desirous that it should have place.

In certain cases, consideration had of the necessary severity of the punishment, and the probable helplessness of the class of persons most liable to be exposed to it, the law, for the better security of the defendant, requires the check of a quasi-jury to be applied to the power of a judge.

When the original examination has been gone through, it will rest with the judge either to pronounce the definitive opinative decree, or to appoint a recapitulatory examination; adding, in this case, the day on which, and the judge by whom it shall be performed.

The opinative decree pronounced, together with the imperative decree grounded on it, — it will rest with parties on both sides either to acquiesce in it, or to make requisition for a recapitulatory examination: which examination will, at the requisition of any party, be accordingly performed, unless preponderant evil in any shape shall have been shown as resulting from it; for example, intolerable expense to any party, or in consequence of the delay, a loss of evidence. A requisition for this purpose differs from an appeal in the ordinary sense of the word, no otherwise than in this, namely, that it may be from the judge in question at one time, to the same judge at another time: and by this quasi-appeal, the expense, delay, and vexation, produced by the transference of parties and evidence, to another and commonly more distant judicatory, is here saved.

If appointment made of the recapitulatory examination be on the part of the judge spontaneous, it will be desirable, if the other business of the judicatory permit, that the judge by whom it comes to be performed should be the judge by whom the original examination was performed. By the recollection of the lights afforded by the original examination, especially in respect of consistency and inconsistency as between the testimony given by a witness on the one occasion, and the testimony given on the other occasion by that same individual, additional clearness, correctness, and completeness, may frequently be given by the conception formed on the later occasion by the judge.

When by the judge no recapitulatory examination is desired, he so declares, and thereupon pronounces his definitive decrees: putting it at the same time to each of the several parties, whether it be his desire to have such examination or not: if of any one of them the answer be forthwith in the affirmative, a day and hour are thereupon appointed: if by any one, time for consideration is requested, a day and hour are appointed for the answer; and in the event of its being in the affirmative, the appointment of day and hour for the quasi-trial remains.

Till such answer is given, the decrees are declared provisional: when the answer is given in the negative, they are declared peremptory.

If it be at the requisition of a party, it may be matter of doubt and discussion, whether on the latter occasion it be better that the judge be the same, or a different one. To set against the advantages of identity as above, there may in this case be the disadvantage resulting from mutual dissatisfaction as between party and judge; the danger lest, from the dissatisfaction testified by the requisition, displeasure, with correspondent partiality, be produced in the mind of the judge: to obviate uneasiness on this score, as far as may be, will of course be among the objects of his solicitude.

Antecedently to this examination, to obviate useless delay, vexation, and expense, the judge will call upon the parties on both sides to admit all such relevant facts, in respect of which no sincere doubt can have place anywhere: giving them to understand,

that of all delay, vexation, and expense, produced by insisting on the re-exhibition, or exhibition of evidence of a matter of fact in relation to which no sincere doubt can have place, the burthen will be made to fall on the head of him or them by whom the evil in this same shape has been produced; and that for any such insincerity, over and above the burthen of making compensation, punishment, under the name of punishment, may, whenever the occasion calls for it, eventually be inflicted.

The recapitulatory examination may have either, or both, of two purposes — namely, 1. Deriving additional instruction out of the mass of evidence; 2. Exposing the conduct of the judge to scrutiny and comment at the hands of the committee of the public-opinion tribunal specially commissioned for that purpose. To the first end it may be contributary, even where there is but one piece of evidence, and that a mass of oral testimony delivered from the mouth of one individual; though the case in which the probability of its usefulness is likely to be greatest, is that in which, by the collision of mutually contradictory testimonies, new lights indicative of the truth are struck out or endeavoured to be struck out: but although, in the case in question, it should be clear that in this shape no good can be produced, there remains that other shape in which it may in any case be produced.

The judge does what in him lies, to the purpose of preventing the right of requiring a recapitulatory examination from being employed by insincerity as an instrument for the manufacture of useless delay, vexation, or expense.

In this view, if upon completion of the examination the requisition appears groundless, he imposes upon the parties concurring in the requisition the burthen of making compensation for the damage produced by it in all shapes: if, moreover, it appears to him, that in the mind of the requisitionist it had no other object than the production of useless delay and expense, to the injury of any other party or parties, he imposes, in addition to the burthen of compensation, a pecuniary punishment to the use of the public; or in case of insolvency, the succedaneous punishment provided by the penal and non-penal codes. But the quasi-jury may, if they think fit, reduce in any proportion the ulterior punishment.

A requisition is said to be accompanied with insincerity, where the nature of the case being such, that on the part of the individual in question, while any such belief as that, by a recapitulatory examination, the evidence can be placed in a light in any respect new, is morally impossible, he perseveres in making his requisition notwithstanding.

In certain cases, the course of the original examination will lead it to assume the character of an explorative, or say an evidence-discovery examination; — during which, the procedure will wear the character, and be designated by the name, of investigatorial procedure.

Investigatorial procedure (as will have been seen in the chapter on Evidence,) has place, in so far as one lot of evidence is employed for the discovery of another.

A lot of evidence, which of itself would not throw light in any shape upon the fact in question, and which accordingly would not be fit to enter into the composition of the grounds on which the opinative decree is founded, may be not the less well adapted to the purpose of bringing to the cognizance of the judge, apt and appropriate evidence: as where auditor says, "I did not see anything that passed; but by oculator I have been informed that he did." Here, then, from auditor, whose testimony with relation to the fact in question is not relevant, the judge is informed of the existence of another individual whose testimony, if the former said true, will, with relation to that same fact, be apt and appropriate evidence; the testimony delivered by auditor will, with relation to that same appropriate evidence, be indicative evidence.

It may happen, that not only the evidence of the same person, but the same article of evidence, shall operate on the same occasion in both characters — that of appropriate, and that of simply indicative evidence; as if auditor were to say, "I saw what happened, and so at the same time did oculator: he being at that same time near me, and looking the same way.

On the occasion of the recapitulatory examination, all evidence which has been merely indicative, and not appropriate, will of course be omitted; that is to say, the individual by whom it was exhibited will not on this occasion be examined; unless perchance such examination should prove necessary to the purpose of corroborating or infirming the testimony of him whose evidence had been stated as being relevant and appropriate evidence: as if oculator, though stated by auditor as having been present on the occasion in question, and upon the original examination admitted his having been so, should, upon the recapitulatory examination, deny his having been so; in this case it might be of use that auditor should be forthcoming for the purpose of being confronted with him, that so, with the help of mutual interrogation, the truth of the matter may be brought to light.

On a day in which there is no recapitulatory examination on the paper, the quasi-jury will add itself to the company of spontaneous visitors.

When in consequence of the recapitulation, the definitive imperative decree is delivered

the burthen of the costs caused by the delay so produced will be imposed by the judge on the parties, in such proportion as to him seems meet.

If it be at the motion of a party that the recapitulatory trial takes place, and such motion of the party is sincere (the judge not being an object of his distrust), it will have had for its cause a hope that when, with a quasi-jury to insure a more attentive consideration, the judge has furnished his mind with this ulterior stock of instruction, his decrees will, on this second occasion, be more favourable than they were at the first.

If the party be insincere, the act in question may have had other causes. Examples are:—1. Material evidence, which had been unfavourable to his side of the suit at the original examination, is no longer forthcoming. 2. The delay, vexation, and expense, inseparable from such ulterior examination, is such as the party on the other side would not be in a condition to support.

Supposing the first of these cases to have place, the fact in question being ascertained, it may constitute a sufficient ground for refusing the recapitulatory examination—or rather for receiving, on the occasion of the second examination, the minutes of the evidence delivered on the former occasion, in lieu of a second oral examination of the same witness, performed in the course of the recapitulatory examination.

If by a party on either side the performance of the recapitulatory examination be objected to, on the ground of his being unable to defray the ulterior expense, this may be a sufficient reason for the refusal of it, unless the party or parties requesting it will provisionally take upon themselves the expense, and make compensation for the delay and vexation in other shapes.

Subsequently to the conclusion of the recapitulatory examination, and antecedently to the exercise of his opinatively-decretive and imperatively-decretive functions, the judge addresses to the quasi-jury his recapitulatory statement.

Of the topics touched upon in the judge's recapitulatory statement, examples are as follows:—

I. On the pursuer's side of the suit—

1. His demand, that is to say, the service demanded by him at the hands of the judge.

2. His ground in the field of law, and whether real law, or fictitious law.

3. His ground in the field of fact: individual facts, the existence of which he asserts as belonging to a class of facts designated as giving to a person (being of the class of persons mentioned for that purpose, of which he says he is one) a title to receive at the hands of the judge the service prayed, at the expense and charge of the person or persons on the other side of the suit. By the portion of law in question, added to the facts the existence of which is asserted, is composed the efficient cause of the pursuer's right, or say title, to the service which he demands.

4. Evidence adduced by him in proof of the facts, the existence of which at the times and places in question was asserted as above.

5. Arguments employed on the pursuer's side; namely, on the question of law, the question of fact, or both; arguments having for their object the inducing the persuasion that the import intended by the law is the import he ascribes to it; and that the facts, of which he asserts the existence, did at the time and place in question exist accordingly.

II. On the defender's side of the suit—

1. His defence, if any, consisting either of the denial of the justice of the demand; or of the counter-assertion of some portion of law, or matter of fact, the effect of which is (admitting the demand to have been just) to produce the extinction of it.

2. If denegatory in respect of the matter of law, thereupon comes his counter-interpretation of the portion of law referred to on the pursuer's side.

3. If denegatory in respect of the matter of fact, thereupon comes counter-evidence.

4. Counter-argument.

5. If the defence has been counter-assertive, thereupon comes on this side the same topics as those on the pursuer's side.

The state of the case, according to the judge's conception of it, being thus brought to view, follow such observations, if any, as in his eyes are necessary or useful, to render apparent the aptitude of the decrees, opinative and imperative, which he has it in contemplation to pronounce.

Next and lastly follows the tenor of these same decrees, accompanied or followed by such further observations or comments, if any, as in his eyes promise to be conducive to that same purpose.

CHAPTER XXVIII.

APPEAL AND QUASI-APPEAL.

§ 1. *Appeal and Quasi-appeal, what?*

APPEAL is where, a definitive imperative decree having been pronounced by a judge-immediate, application is made by a party to a judge-appellate, requesting him to reverse or modify it.

Quasi-appeal is where, by the judge-immediate no definitive imperative decree has been as yet made; but by something which has been done, or omitted to be done by the judge-immediate, such effects have been produced as that, in disfavour of the quasi-appellant, the same effect has been, or is about to

be produced, as would have been produced by a correspondent imperative decree.

A quasi-appeal is therefore a petition praying for relief, in a case in which by relative inaction, that is to say, for the want of some appropriate decree, and execution and effect thereto given, the quasi-appellant has suffered, and is suffering, a wrong to the same effect as if an imperative decree in his disfavour had been issued and executed.

If by relative inaction, the effect of a positive decree in disfavour of a party is produced, it will be by means of the want of forthcomingness on the part of some thing or things, person or persons, either to the purpose of justiciability, or to the purpose of evidence.

If it be for want of forthcomingness for the purpose of evidence, the justificative cause of complaint will be because, had the piece of evidence in question been forthcoming, it would either of itself or in conjunction with some other piece or pieces of evidence, have been at once sufficient to form an adequate ground for the definitive decree, which, on the side of the party in question, it is the object of the suit, or the defence, to obtain from the judge.

If it be for the want of forthcomingness for the purpose of justiciability, it will be because, had the thing or the person in question been forthcoming, execution and effect might in a certain shape have been given to a decree in favour of the party by whom it was prayed for in the course of his pursuit, or his defence, as the case may be ; whereas for want of it, neither in that same shape nor in any other adequate to it, could such execution and effect be given to such decree, if issued.

Of forthcomingness on the part of persons and things, for the purpose of justiciability, examples are as follows :—

1. Production of a person within the physical power of the judge for the purpose of his being eventually placed within the physical power of a party: of the person of a wife, for the purpose of her being placed under the physical power of her husband: of a child, under the physical power of his or her father, or other guardian.

2. Production of a thing claimed by a pursuer for the purpose of its being placed under the physical power of such pursuer: production of a mass of property belonging to a defendant, for the purpose of its being sold in the way of auction, by an appropriate functionary of justice, to the end that the produce of the sale may be delivered by him to the pursuer, in satisfaction for a debt due to him from the defendant.

If for want of such dispatch as could have been and ought to have been given by the judge immediate, irreparable injury, by want of forthcomingness of some person or some thing (whether for the purpose of evidence or for the purpose of justiciability,) is produced, such judge is responsible, non-penally, or even penally, or in both ways, as the case may be.

Of incidents whereby forthcomingness, which in regard to a thing necessary as a means of satisfaction or of punishment, or of evidence, might within the proper time have been effected, but which by the lapse of that same time has been rendered impossible, examples are as follows :—

1. Expatriation—the thing carried out of the power of the whole judicial establishment, as well as of the particular judicatory in question.

2. Latentcy—the place in which the thing is, unknown ; namely, to those whose knowledge of the place where it is, is necessary to the forthcomingness of it.

3. Deperition.

4. Relative deterioration.

Of occurrences whereby as a means with relation to the like effect, relative forthcomingness in the instance of a person may have been rendered impossible, examples are as follows :—

1. Expatriation.

2. Latentcy.

3. Insolvency.

4. Death.

5. Relative deperition or deterioration of appropriate faculties.

In so far as it is in the character of a source of evidence that the thing or the person might and would have been made to minister to the purposes of justice—to rectitude of decision, in the case in question, the causation of non-forthcomingness has the effect of suppression of evidence; suppression, of which on one side the effect may have been the same as forgery of evidence — namely, as forgery of evidence having with the same force the opposite tendency.

§ 2. *Grounds for quasi-appeal.*

Necessary to the actual execution of any ordinance of the law, in conjunction with the means of proof, the means of execution, and the means of appropriate communication on the part of all pursuers, on whom the result depends,—are the *disposition* and the *power* to employ them to that purpose with effect. Suppose these requisites, all of them to have place—you suppose the effect to have place : suppose any one of them not to have place—you suppose the effect not to have place.

By delay, by what cause soever produced, whether by purely physical agency, or human agency ; if by human agency, whether avoidable or unavoidable; and if unavoidable, whether with or without blame,—the effect of misdecision may in any one of these cases alike

be capable of being produced. In so far as it is unavoidable, there is nothing to be done—in so far as it is avoidable, thereupon devolves upon the legislator the care of preventing it: of preventing it, and in so far as blame is attached to the existence of it, punishing it in an effectual manner.

By precipitation, the shapes in which the effect of misdecision, ultimate or antecedent, is also produced, are as follows:—

All the several modes in which, as above, it is producible by delay. For suppose, for example, an ultimate decision pronounced at a time when either the requisite means of proof or disproof that could have been employed, have not been employed, or some necessary means of execution, which, but for this promptitude of the decision, might have been employed, have failed to be employed: in this case likewise; the decision pronounced will either be misdecision, or be productive of the same effect as if misdecision had had place: an effect opposite to that which would have had place, had due execution been given to the law, may in consequence have had place.

In comparison with delay, promptitude has the advantage of not being, as delay essentially is, productive of vexation and expense, in addition to misdecision or the evil effect of it.

On the other hand, instances occur, in which by precipitation, misdecision, actual or more or less probable, is capable of being produced, in cases in which delay is scarcely of itself capable of being productive of the like effect.

Cases may on any sort of occasion have place, in which, to the rendering of a right decision, and consequently to the avoidance of misdecision, one or both of two things for the guidance of decision are necessary. These are—

1. Argumentation; hearing or reading from the lips or pens of others, such observations, whether on the question of law, or on the question of fact, as may be necessary to the placing the matter of fact or the matter of law in a clear light.

2. Consideration; which is, in effect, an operation of the same sort as that of argumentation, with only this difference, that the mind of the judge is the only seat of it.

A ground for a quasi-appeal, is any act affirmative or negative, on the part of the judge below,—any act affirmative or negative, the effect of which is or would be to place the quasi-appellant in the same situation as if an undue definitive decree in his disfavour had been issued and executed, or but for the remedy demanded by the quasi-appellant, would be.

Referable to one or other of the heads following, is every judicial act having the effect of misdecision:—

1. Denial, declared or virtual, of means of proof; to wit, either in the aggregate, or in the instance of some one understood, and assignable means or article of evidence.

2. Denial, declared or virtual, of some means of execution, actual or eventual, in possession or in expectancy.

3. Denial, declared or virtual, of some means of communication necessary to the obtainment of some means of proof, or of some means of execution or acquittal in time for the purpose.

4. Denial, declared or virtual, of means of defence, actual or eventual, in possession or expectancy.

5. Undue delay, whereby the obtainment of some means of proof in appropriate time, or of some means of execution, actual or eventual, in a direct way, or by withholding of some means of communication, is prevented or unduly retarded.

6. Undue precipitation, whereby the obtainment or use of some means of proof, execution, or communication as above, or of some means of elucidation in the way of argument, is prevented.

Wrong, in these its several shapes, has its correspondent remedy, which, if the quasi-appeal be well grounded, it belongs to the appellate judicatory to apply; as also to each such remedy, its correspondent petition or demand.

1. For denial of means of proof: remedy, imperative decree, ordering supply of means of proof, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed in his correspondent opinative decree. Name of the correspondent demand,—Petition for supply of means of proof.

2. For denial of means of execution: remedy, imperative decree, ordering supply of means of execution, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact conformity with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed in his correspondent opinative decree. Name of the correspondent demand,—Petition for supply of means of execution.

3. For denial of means of communication; remedy, imperative decree, ordering supply of the means of communication, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed

in his correspondent opinative decree. Name of the correspondent demand,—Petition for supply of means of communication.

4. For denial of means of defence: remedy, imperative decree, ordering supply of means of proof, or means of judicial assistance, for the purpose of information, advice, or argument, in the shape belonging to the nature of the case, and determined by the judge-appellate, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity with his own more or less different views of the case, as expressed in his correspondent opinative decree. Name of the correspondent demand,—Petition for supply of means of defence.

5. For undue delay, whereby timely obtainment of means of proof or execution, or means of acquittal or defence, may have been prevented; and on the pursuer's side execution, and on the defendant's side acquittal, are at any rate retarded:—remedy, imperative decree, ordering dispatch, either in exact compliance with the terms of the demand, or in conformity with the more or less different views of what the case requires, as expressed in the correspondent opinative decree. Name of the correspondent demand,—Petition for dispatch.

6. For undue precipitation, whereby obtainment of means of proof, means of execution, means of communication, means of elucidation by argument, or means of acquittal or defence, have or may have been definitively or temporarily prevented,—Petition for reversal, with such particular remedy as the case may require.

In a certain case, over and above vexation and expense by delay, the effect of misdecision may be produced. This is when the period within which a means needful, and of itself, in conjunction with other means, sufficient to give execution and effect to the portion of law in question, might have been obtained, has been suffered to elapse: rectitude of decision is thereby rendered impossible, and misdecision is made to take its place. Say for shortness,—through delay, misdecision necessitated; or, through delay, right decision impossibilitated.

Of other competent grounds for a quasi-appeal, examples are as follows:—

1. Non-allowance of the faculty of taking a transcript of the record, or of so much as to constitute a sufficient ground for his petition.

2. Out of the record, omission of some particular which ought to have been inserted.

3. In the record, insertion of some portion of discourse not conformable to the truth.

4. In the record, substitution of some portion of discourse not conformable to truth, to some portion of discourse conformable to truth which ought to have been contained in it.

5. Insertion given in the record to matter irrelevant, or otherwise immaterial, whereby to the labour or expense of transcription a needless addition has been made.

In each of the above cases, the mischief from the wrong will of course depend upon its effect on the issue of the suit. In so far as things can be placed in the same state as they would have been in had the wrong not been done,—to place them in that state will be the appropriate remedy: in so far as this cannot be done, compensation at the expense of the wrong-doer, and of all concerned in the doing of the wrong, will be the remedy required.

The provision here made supposes, that the relief here allowed to be prayed for at the hands of the appellate judge, has in substance been denied by the immediate judge.

The hearing before the quasi-jury is the stage at which, if at any, arguments in form, with or without professional advocates, are heard.

If on any occasion the decision of the judge fails of being acceptable to a party on either side, that is the stage at which he prefers to the appellate judicatory an appeal, or a quasi-appeal.

The quasi-appeal is, as has been seen, a petition in any one of the six forms just mentioned. It is called a quasi-appeal, because though not in any one of those instances what has been commonly understood by the word appeal, yet in every one of them, the effect which it seeks to produce is the same as that which (in the case of success) is produced by it;—the remedy producing in favour of the complainant an effect which is the opposite of that which would have been produced by the alleged grievance complained of.

Of everything that passed, as well on the original examination as on the recapitulative examination (if being granted, it take place), minutes will be to be taken on this occasion, as on the others, by the registrar: so likewise may they by any and every person so disposed.

In this case, they may eventually form a ground of accusation against the judge, either before the justice-minister, or before the public-opinion tribunal, with a view to eventual dislocation,. as per Chap. XXII. —*Appellate Judicatories*, Constitutional Code.

If by reason of non-compliance with a petition for a supply either of means of proof or means of execution,—misdecision or non-decision, misexecution or non-execution, shall have taken place, the judge by whose default misdecision or the equivalent of it shall have taken place, is responsible compensationally, or even punitionally, by decision of the justice-minister, if such failure has had evil consciousness or rashness for its accompaniment.

§ 3. *Uses of Appeal.*

WHAT is the use of appeal? If judges who act in the first instance are subject to error —are liable to be deficient in appropriate aptitude—so are those who act in the second instance: and from the mere circumstance of their being set to work after the first, what ground can you have for the expectation of a higher degree of aptitude on the part of the second?

Answer: The use is, that one set of judges may have another to stand in awe of —a set in whose instance, if on any occasion it happens to him who acts in the first instance to be actuated by sinister interest, in whatever shape (love of ease included,) there will be another who, by the love of power as well as the sense of obligation, will be naturally disposed to correct his errors.

The purpose might therefore be in a main degree answered, if the functions were reversed: the immediate judges made appellate only, and the appellate judges made immediate only.

Hence one reason why immediate jurisdiction should not be given to appellate judges; for if it were, there would be none of whom they would stand in awe.

From immediate judges, arbitrary power is taken away, by the setting of appellate judges over their heads.

From appellate judges, arbitrary power is taken away by their not having the initiative; and because, if they make any undue alteration in the decrees pronounced by the immediate judges, there stand already those same decrees, with their respective reasons, constituting a standard by which the operations of the appellate judges will be tried by the public-opinion tribunal, as the operations of the immediate judicatory have been by the appellate.

When once it is established that there ought to be two sets of judicatories, one above another, it is better that those who have had most experience should sit in judgment over those who have had the least, than those who have had the least, over those who have had the most. But rather than there should not be two different sets, those of one set sitting in judgment over the acts of those who have acted in the first instance, it were better that appeal should in particular cases go from the appellate to the immediate judicatories, than that there should be no appeal from the appellate—than that there should be any judge whose proceedings there should be no other judge to take cognizance of, with a power of eventual correction.

Not having had the advantage of hearing the orally extracted evidence, while the immediate judge has had that faculty, the appellate judge is empowered, it may be observed, to reverse the decree of the immediate judge in respect of the matter of fact, although his means of coming at the truth are so much less efficient: and as the public-opinion tribunal at large is so circumstanced as not to have the possibility of availing itself of those superior means, any more than the appellate, to whom those means are denied, why not leave the power of determining the fate of the cause in the hands of those whose means for forming a right judgment are so much superior to any that can be employed either by the judge above, or by the ultimate superiors of the highest grade—the possessors of the constitutive authority, in their character of members of the public-opinion tribunal?

Answer: The least important advantage must yield to the most important. A check applied by superordinate authority to a power which would otherwise be arbitrary (placing everything dear to man in the hands of an unchecked functionary or set of functionaries,) is a security too indispensable to be foregone on any account whatever. The advantage, from vesting the power of deciding on the question of fact in the hands of the same individual by whom the evidence in relation to it has been received and collected, would be indeed a very considerable advantage; but in point of importance, this cannot enter into competition with the other. In all probability, this advantageous union will have had place in the great majority of the whole number of instances; only comparatively in a small proportion, will appeal have place; and of those cases in which it has place, only in a very small proportion will the appellate judge think fit to substitute his opinion to that of a judge whose means of judging the whole matter have been to such a degree more instructive than his. In this case, it is not for what he is likely to do,—it is only for what it will be seen that in case of necessity he has it in his power to do,—that the faculty of undoing what the immediate judge has done, is put into his hands.

By the public-opinion tribunal the exercise of a power thus extraordinary, is not likely to be left unwatched. The party in whose disfavour it is exercised, is not likely to be backward in complaining of any abuse, with which in his opinion it can be made chargeable.

In all the cases in which power is given to the appellate judge, of reversing the decrees of the immediate judge, on the ground of the evidence as it stands upon the record, power is also given to him to send the question of fact to be tried over again in a neighbouring judicatory: the orally extracted evidence, (which is the only sort of evidence to which the question applies) to be there extracted anew—such of it as remains still obtainable. This option, in case of his disapproving of the

decrees below, it will be naturally expected that he should embrace where the importance of the suit is such as to warrant the additional expense; and it is manifest how considerable the reduction is which will require to be made from this source, from the number of instances in which the decrees of the original judicatory are likely to undergo material change.

Number of cases in which appeal may be made, say 100; of these, the number in which the decree below undergoes alteration in consideration of the opinion formed on the question of fact, 10: of these ten, the number of those in which, without sending the question to another trial, reversal or other material alteration takes place, two. What is the consequence? Answer: That notwithstanding the power of reversal lodged in the appellate judicatory, the fate of the suit is decided, in 24 instances out of 25, by the immediate judge.

If the union in question is to such a degree beneficial as above supposed, the more beneficial it is, and is seen to be, the greater will be the degree of confidence reposed by the public opinion tribunal in a decree passed by a judge by whom this advantage has been possessed, as compared with that reposed in the decree of a judge by whom this same advantage has not been possessed. Thus, then, the strength of the check rises in proportion to the demand for the application of it.

The greater the extent to which the public-opinion tribunal keeps itself in accordance with the opinion expressed by the decrees of the judiciary establishment, the more perfectly will the system of procedure fulfil the ends of its institution.

If, instead of committing the second trial to another judicatory, the appellate judge had the power of receiving and extracting the orally delivered evidence in his own person, and to decide in dernier resort on the ground of the evidence so collected and extracted, his power would thereby be unchecked and arbitrary as above; there being no other authorized to reverse or modify it. But suppose the second trial to be by another judge immediate, the decree of the second judge immediate would, in the same manner as that of the first, be subjected to reversal or modification at the hands of another judge, namely, the judge appellate, and thus saved from the charge of arbitrariness.

Stages of appeal, why not more than one? Answer: Because by a single one, the beneficial effects above mentioned are secured: and by every additional stage, the evil opposite to the collateral ends of justice would receive vast increase, while to the obtainment of the direct ends of justice no additional probability would be given.

Question: Why allow modification or reversal of the decree of the judge-appellate in case of his being actually punished, and not otherwise?

Answer: Because if the decree might be reversed or modified without the judge's being actually punished, criminality would be imputed by the appellant as a matter of course, for the mere purpose of obtaining the right of appeal; and by wrongdoers in possession, frequently for no other purpose than that of increase of delay, vexation, and expense.

Question: Why not allow the appellate judicatory to have for its decrees any other ground than what has been afforded by the record of the proceedings of the immediate judicatory?—why not allow it to examine fresh evidence?

Answer:—1. The proper point of view for the appellate judicatory to contemplate the evidence and other proceedings in, is that in which alone the public-opinion tribunal can contemplate them.

2. Only from such evidence and grounds as he had before him, can the appellate form any just conception of the conduct of the immediate judge.

3. If the case be such, that subsequently to the decrees of the immediate judicatory, fresh evidence impugning the decree has come to light, it is to the immediate judicatory that it ought to be presented, and not to the appellate. If presented to the appellate, without passing through the immediate, the evidence would not have the benefit of an examination before a quasi-jury.

If it is for want of evidence that might and should have been contributed to and received by the immediate judicatory, that a supposed misdecision has taken place, the remedy that should be applied is a petition to the immediate judicatory—a petition for supply of evidence; of which petition, the denial forms a ground for quasi-appeal.

§ 4. *Proceedings before the Appellant Judge.*

On the occasion of a petition for a supply of evidence, the party gives indication of the source from whence the evidence is desired, and states the terms in which it is his desire that the appropriate imperative decree should be expressed; adding, in case of non-compliance, a petition for the hearing of the former petition before a quasi-jury.

On the occasion of a petition for securing eventual forthcomingness of means of execution, the party gives indication of—1. The existence of the objects; or, 2. The articles in question, with their general description; 3. The necessity of apt arrangements for securing their eventual forthcomingness; and, 4. The terms in which it is his desire that the appropriate imperative decree shall be expressed; adding, in case of non-compliance, a petition for hearing as above, before a quasi-jury.

On the occasion of a petition for a recapitulatory hearing before a quasi-jury, appointment is prayed of a day and time on which the hearing shall have place.

On the occasion of a petition for dispatch, the party gives indication of each particular operation or set of operations which it is his desire to see performed, and states the terms in which it is his desire that the imperative decree for the performance of it shall stand expressed; adding, in case of non-compliance, a petition for hearing as above, before a quasi-jury.

On the occasion of a petition for right execution, he states the particulars in which the execution given to the imperative decree in question has failed of being conformable to it; adding, in case of non-compliance, petition for hearing before a quasi-jury.

On the occasion of a petition for execution, he states the time and manner in which it is his desire the execution should be performed; adding, in case of non-compliance, petition for a hearing before a quasi-jury.

At the time appointed for argumentation, the official respondent on the appellant's side declares whether he does or does not see any objection to the decision appealed from: if he does not, the decision is confirmed, unless the appellate judge of himself sees any sufficient specific ground, which he declares accordingly, for reversal or modification: if the declaration of the official respondent be in the affirmative, he thereupon states his objections, and argues in support of them; and upon hearing the argumentation on both sides, the judge appellate decides.

If on either side the party, or any substitute, professional or non-professional, deputed by him, appears and argues, the duty of the official respondent does not take place on that side.

In a penal suit, if the appellant, being the defendant, is not in a state of incarceration, he is at liberty to repair to the appellate judicatory, and make representation in his own person, as well as in the person of a substitute, professional or non-professional.

So, if he is in a state of incarceration, on paying the expense of conveyance in custody, unless his case be of the number of those in which, to warrant appeal, the fiat of the quasi-jury is necessary: neither in this case is he transferred to the appellate judicatory, unless for such transference a separate fiat from the quasi-jury be granted.

In a penal suit, if the decision of the immediate judicatory be simply confirmed without modification, to prevent undue delay, and on the part of the pursuer groundless vexation and expense, the defendant will be liable to additional punishment as of course; but with power to the judge-appellate to remit it in the whole or in part, for specific cause assigned. In regard to the quantum of such punishment in the several cases, provision will be made elsewhere. On this occasion, the minimum of that which will suffice for the prevention of insincere appeals is all that will be appointed.

In every case alike, where the quasi-appeal is regarded as groundless, or not sufficiently grounded, the appellate judge issues his opinative decree, Quasi-appeal (naming it;) to wit, Petition for supply of means of proof, for means of execution, &c., groundless, or not sufficiently grounded. Terms of the imperative decree addressed to the judge below. Proceed to execution, or proceed to acquittal; as the case may be.

If, from what appears on the face of the record, the nature of the case is such, that wrong in one or more of the above shapes having been committed, the appellate judge can see what is the proper issue of the suit, he declares as much, and decrees accordingly; giving such definitive decree as might have been given had the definitive decree been pronounced by the immediate judicatory in disfavour of the party wronged, and an appeal made against it in consequence.

If no such conception can be obtained, he declares so much by his opinative decree, and by an imperative decree orders a new quasi-trial, if that can afford a remedy, in the same judicatory or another, as seems to him most apt.

In any case, for injury in whatever shape produced by the wrong, he orders compensation.

§ 5. *Checks.*

Except as to the differences resulting from difference of situation, the checks applied to conduct, and thence the several securities established against misconduct, in the case of the immediate, have place in the case of the appellate judge.

These differences are as follows:—

In the case of the judge-appellate, to the security afforded by the obligation on the part of the judge-immediate principal to have served in the capacity of judge-immediate depute, is added that of having served in the capacity of judge-immediate principal.

Modified in the case of the judge-appellate, is the check applied in the case of the judge-immediate, by the attendance of law students in the visitors' gallery. Antecedently to the admission to practise in the appellate judicatory, to the five years of attendance requisite to admission to practise in the immediate judicatory, are added [ ] months and no more, of attendance in the appellate judicatory.

In the case of a judge-appellate, the check which, in the case of a judge-immediate, as applied to the virtual appeal from a judge

without a jury, to a judge in the same judicatory with a jury, cannot have place: a judge-appellate not hearing anything without a jury.

In the case of an appellate judicatory, the check applied by appeal to a superior judicatory has no place: except in the case in which the part allotted in ordinary cases to an immediate, is performed by the appellate judicatory, such as that of a complaint, of the number of those registered in the incidental complaint-book. In this case, from the decrees of the appellate judicatory, appeal lies to the justice-minister.*

To the situation of judge-appellate, the check applied to the situation of judge immediate, by his dislocability by the judge-appellate, is obviously excluded by the nature of the case.

As to dislocation: dislocable is an appellate judge, not by the electors of any subdistrict, but by those of the district or assemblage of districts over which his local field of service extends.

There follows, as to undue delay, a check not applicable to the case of an immediate judicatory. If within a certain length of time after receipt of the record, no decree has by the appellate judicatory been pronounced, the decrees of the immediate judicatory are thereupon understood to be confirmed: and if, after receipt of notice given of the lapse of the interval to the registrar of the appellate judicatory, and due time, to wit [ ] days, allowed for inhibition therefrom, no such inhibition has been received, execution is forthwith given by the immediate judge to his decree.

So, if in the mean time application for argumentation has been publicly made to the judge-appellate by a party on either side, and the faculty of argumentation has been refused, namely, directly or virtually, by non-appointment of day and hour, or by omitting to hear argumentation after appointment,—to the registrar it belongs to make entry thereof on the record, antecedently to re-transmission made as above.

So, if to application publicly begun to be made, the judge-appellate should refuse ulterior audience. Such refusal would moreover be a punishable offence, and might be denounced as such to the justice-minister, and thereby to the public-opinion tribunal, to pave the way for eventual dislocation.

§ 6. *Options of Judge-appellate as to Judge-immediate.*

On view of the record, after entry made of his decrees opinative and imperative, in relation to the suit brought before him, whether in the way of appeal or in that of quasi-appeal, the judge-appellate will subjoin an opinative decree on the subject of the conduct of the judge below. The options given to him on these particulars are expressed in the words which follow:—

1. Judgment supposed erroneous, as expressed,—in respect of intention, conduct blameless.

2. Judgment supposed erroneous, as expressed,—mind supposed not sufficiently attentive: follows a statement, declaring the passages in which this opinion has had its ground.

3. Decree erroneous, as expressed. Suspicion is entertained of a deficiency in respect of appropriate aptitude, stating in which branch, moral, intellectual, or active, as the case may be: follows a statement, declaring the passages in which the opinion has had its ground.

If the last of those options be embraced, the judge-appellate transmits the record, or a transcript thereof, to the justice minister, who thereupon acts as per Chap. XXII. Constitutional Code.

§ 7. *Evidence discovered after ultimate decrees, how far producible.*

In relation to any matter of fact, what may sometimes happen is, that after a suit instituted and terminated, evidence transpires, by which, had it been received in time, decrees opposite to those by which the suit has been terminated would have been pronounced. In such cases, the proper judicatory to apply to is the judicatory in which the suit has been so terminated. But in such a case, exceptions excepted, the judge will not grant and appoint a fresh recapitulatory quasi-trial, unless, upon examination of the party applying, he is satisfied, that of the evidence in question the party had not, antecedently to the utterance of the definitive decrees in question, any knowledge.

Exceptions are as follows:—

1. Where, though at the time in question he did not either tender or require the extraction of the evidence in question, he gave indication of the existence of it—the non-production of it having for its cause the conception of the adequacy of the mass of evidence actually adduced, coupled with the desire of avoiding the delay, vexation, and expense inseparable from the production of it, and the persuasion of the non-necessity of it as above.

2. Where, antecedently to the termination of the suit as above, the existence of a certain article of evidence material to the corroboration of an article of newly discovered evidence, was known; but the newly discovered evidence itself not being known, the materiality of it could not be then known,—

* Of this case, exemplifications, it is obvious, if ever they occur, will in all probability be extremely rare.

the reason for giving indication of it had not place therefore at that time.

Examples of such demand for subsequently and accidentally-discovered evidence, are as follows :—

1. Field of law the non-penal branch.—Subject-matter of suit, aggregate mass of the property of a person recently deceased :—Ground of decision, testament of a certain date :—fresh evidence subsequently discovered, a testament of posterior date, in the custody of a person whose existence or chief abode was not at the termination of the suit known to the party on whose behalf the fresh examination is required.

2. Field of law the penal branch.—Defendant in a penal suit for homicide :—quasi-trial, after recapitulatory examination, and by appropriate decrees opinative and imperative, acquitted. Evidence the existence of which was neither known nor suspected, afterwards comes to light. Examples :—

1. The defendant, in contemplation of death, smitten by remorse, confesses, but recants.

2. In a fit of drunkenness, or in his sleep, defendant utters particulars which lead to the discovery of evidence, the existence of which had not been suspected.

3. Habiliments, or other goods known to have been the property of the deceased, are discovered in the possession of the defendant : or the dead body, or the skeleton, known by some peculiar marks to have belonged to the deceased.

4. An individual who, in relation to the transaction, by which the death was occasioned, had been an eye-witness ; or in relation to some fact probatively operating as an article of circumstantial evidence, returns from beyond sea, and makes known what he saw.

§ 8. *Security against undue punishment of an irreparable nature.*

Without express confirmation by the appellate judicatory and the justice-minister, no imperative decree, ordering, under the name of punishment or otherwise, irreparable change in bodily condition, shall be considered as intended to receive execution. Examples of such change are the following :—

1. Mortal punishment.

2. Mutilation : loss of the substance, or use of a portion or organ of the body.

3. Stigmatization : understand, when performed in such manner that the effect shall be indelible.

4. In the case of a female, defloration : as where, on the termination of a suit, antecedently to known consummation, a female is ordered to be delivered into the power of a man adjudged to be her husband.

For the completion of the list, see the non-penal and penal Codes.

CHAPTER XXIX.

NATURAL AND TECHNICAL SYSTEMS COMPARED.

ONE main feature of natural procedure is a special regard to avoid adding to the suffering of the innocent, the indigent, and the (for whatsoever cause) afflicted : corresponding feature of technical procedure, blind oppression of the innocent, the indigent, and the already afflicted.

Examples :—Indiscriminate imposition of the burthen of costs in all stages from that of accusation to that of execution inclusive.

To this head belong all fees exacted of persons imprisoned on mesne process, and thence before conviction : as well as on imprisonment in consequence of conviction.

The infinitely diversified, but in most cases enormous length of time, during which, in consequence of accusation, and before trial, in cases liable to incarceration, persons are subjected to it.*

In all cases of penal procedure, the declared supposition is, that the party accused is innocent ; and for this supposition, mighty is the laud bestowed upon one another by judges and law-writers. This supposition is at once contrary to fact, and belied by their own practice.

The defendant is not in fact treated as if he were innocent, and it would be absurd and inconsistent to deal by him as if he were. The state he is in is a dubious one, betwixt non-delinquency and delinquency : supposing him non-delinquent, then immediately should the procedure against him drop : everything that follows is oppression and injustice.

Of this oppression, the immediate cause is the enormous interval, so wantonly interposed between one part of the procedure and another. This is a consequence of the unfeeling disregard above mentioned ; of that disregard, the original sin of judicial procedure (more or less flagrant perhaps in all countries, but more particularly in England ;) the substitution of the actual ends of judicature to the ends of justice.

To such a length has this disregard proceeded as to have produced a tax, and that to an enormous amount, on what are called free pardons.† For pardon (though under English

* This applies with more or less force to the whole of England not within the jurisdiction of the central criminal court.—*Ed.*

† These free pardons were formerly under the Great Seal. The expense of obtaining these documents was so great, that they were seldom or never applied for, except when in the course of some suit or other it became necessary to prove the fact of the pardon of the individual in question. Now, by a statute passed during the reign of George IV. (7 & 8, c. 28, § 13), a pardon under the sign-manual has the same effect as

law altogether arbitrary,) there are several incontestably proper causes. As to this, see Constitutional Code, Chapter XXV. *Justice Minister*, § 5. *Dispunitive function.*

Oppression of the indigent, grievous in proportion to their indigence. Oppression in this shape has for its cause, the employment given to fixed sums, on whatsoever accounts imposed (viz. penalty for delinquency in its various shapes) by substantive law : taxes and fees to functionaries of both sorts, judiciary and professional, under procedure law.

The effect which blind fixation has in giving encouragement and birth to crime in all manner of shapes, is a topic of animadversion elsewhere. What belongs to the present occasion is the effect it has on the suffering of the absolutely or comparatively indigent, an effect which goes to the rendering the suffering of one individual, rise to some thousand times the amount of the suffering of this or that other, from a cause nominally, and in the eyes of a careless observer, the same.

The case mentioned as the case of the already afflicted, belongs more particularly to that in which the offence is not considered on the footing of a criminal one, but only as injurious, and thus producing a demand for compensation. If prevention of such offences were the end in view, matters would be so managed, as that whatever expense were imposed or left unremoved, should *antecedently* to decision be minimized, and after decision thrown with its whole weight (state of pecuniary circumstances considered) on the party in the wrong, in the case of rashness; with a purposed addition in case of evil consciousness.

Between operation and operation in the course of the suit, beginning with the first, whatever that may be, long intervals are established by general rules, without regard to the difference in respect of length of intervals, rendered necessary to justice by the circumstances of the several individual cases.

These intervals are fixed in regard to time, without any regard to distance in respect of place.

By general rules, transference from judicatory to judicatory and back again; thence vast delay, vexation, and expense, without any benefit: on the contrary, with great detriment to justice in respect of avoidance of misdecision, by breaking the thread of the evidence, belonging to the suit; appointing one part to be elicited by one judicatory in one place; another part by another judicatory at another place; and the other parts at the judicatory in which the suit commenced.

Mode of proceeding, by action at common law. In the three common-law judicatories of the metropolis—the King's Bench, Common Pleas and Exchequer—the mode of procedure in this case is not very materially different.

First comes the writ. But the only end and effect of this is to cause the defendant to appoint an attorney to carry on the suit in his stead. Here the instrument of summons, warning, notice, or whatever it may be called, is at a fixed price (or at any rate at a price that ought to be fixed,) purchased of a subordinate instrument and justice-seller of the judge—the judge himself never knowing anything of that which in this way is done by his authority, and in his name.

Next comes the declaration. But this, though an assertion, and though in that character effect is given to it, is not considered in the character, nor designated by the name of evidence. It has always more or less of falsehood in it. The attorney (for the party never knows any more of the matter than the judge does) utters this falsehood knowingly and wilfully, and without any apprehension, because without any danger of suffering from it. For the utterance of it, he and his instrument and accomplice, the special pleader, are well paid: and except the receiving of this pay, the only effect of it is to elicit, under the name of a plea, the corresponding mass of falsehood and absurdity, from the attorney in league with a special pleader on the other side.

Thus continues the chain of falsehood and absurdity, from mouth to mouth, and from year to year, between one link and another; there being in particular four long intervals, one of them of the length of three or four months, lest the suit should come too early to a close. All this while no assertion made, which under the name of evidence is admitted to constitute a ground for the ultimate decision, by which execution and effect is given or denied to the portion of law on which the demand is as by the declaration professed to be grounded.

If the instrument put forth in the first instance by the defendant, in answer to the plaintiff's declaration, is of such a nature as to come under the denomination of a general issue of which according to the nature of the demand there are five or six sorts, there is another tissue of useless falsehoods and absurdities, and the suit goes to some place in every variety of distance, between 0 feet, and about 300 miles, from the place at which it was commenced, to be tried; that is to say, now for the first time is any mass of assertion received, to which, as above, the character and effect of evidence is ascribed. Here for the first time, a functionary bearing the title of judge takes (unless by accident as hereafter mentioned) cognizance of the evidence of anything that has passed in the

if it were under the great seal. Pardons so attested are, I believe, granted without any charge.—*Ed.*

course of the suit. This judge is not necessarily the judge under whose authority the suit was commenced, or the power of compelling the adverse party to act in the character of a defendant, sold. For the useless course of falsehood and absurdity, months in large numbers as above, or years in small numbers, are allotted: for the elicitation of the only mass of assertion which is so much as professed to be taken for the ground of decision, sometimes not more than two or three days, for all the number of suits that can come to be heard in the same place, are allowed. Upon an average, not more than two or three times as many hours are allotted, for the only mass of information which is or can be applied to use, as the number of months or even years that are allotted to the elicitation of that which is so completely useless.

Proceedings by indictment:—Here a new scene opens. The case where the proceedings by indictment are preceded by proceedings before a justice of the peace—this case not covering more than a part of the field covered by the mode of procedure termed an *indictment*, must for the present be postponed. Here the scene opens with the proceedings before the grand jury. The grand jury is a judicatory not presided over by a professional and permanently existing official person, a judge; but a company, a miscellaneous company of men, selected on the presumption of possessing a certain degree of opulence: in number from 12 to 23. To pronounce a decision in favour of the demand, 12, but not less than 12, are sufficient. But here the information furnished is put upon the footing, and bears the character and denomination of evidence. Here, then, is a mass of evidence: what next becomes of it?—is it never acted upon? No, never. It is uniformly let drop, and forgotten: all the use made of it, is the enabling this majority, if such be their pleasure, to send the cause to be tried upon evidence not quite so sure of perishing, by a judge or jury in the same manner as an action as above is tried. And this in many cases with needless delay: as also in length various, but in no case so enormous as to be worth mentioning in comparison with that which in the mode of suit called *action* has been seen organized. Now, in this preliminary operation, by which during a course of several days perhaps, from 12 to 23 persons have been occupied in the situation of judges, besides an altogether unlimited number in the character of witnesses, what is the use? Answer: Absolutely none. What is the effect? To enable these 12 or 23 esquires, as they are called, to afford impunity without reproach to every malefactor to whom it suits their purpose to afford this encouragement to crime. Yes: such is the purpose, if not of the creation of the institution, of the preservation of it: and for this purpose it is, if for any purpose at all, that the veil of secresy, by means of the sanction of an oath—that veil which *originally* was thrown over it for other purposes—is preserved over it.

Parties' appearance.—Various are the ways in which the institution, by which parties are exempted from the obligation of appearing face to face in the judicatory, in the presence of the judge and the assembled public, is inimical to the ends of justice, and conducive to the actual ends of judicature.

In the first place comes the pecuniary profit, immediate and direct, to both branches of the fraternity, professional and official.

Encouragement given to the relatively and comparatively opulent, who are able without difficulty to defray the expense as above, to oppress and provoke the relatively and comparatively unopulent: from the provocation in so far as submitted to without retaliation, no self-regarding profit accrues to the lawyer tribe in a pecuniary shape: remains only the gratification to aristocratical sympathy, from the spectacle of a class of men below them, suffering under the yoke imposed upon them by the class to which they of the law-learned class do belong. But every now and then, resentment under oppression gets the better of prudence: then comes retaliation, and from retaliation, litigation, in which the party originally oppressed and injured is made defendant.

Great is the assistance which this plan of depredation receives from the darkness in which the whole system of procedure is involved by the thick cloud of technicalities. No means has any ordinary man of knowing beforehand, what the quantum of expense is, in which before the termination of the suit he has in contemplation, he may be involved.

In a common-law case (in Westminster Hall,) to a question what the expense (on the plaintiff's side suppose) will be, he is informed it may be about thirty pounds, more or less. Nor is the information absolutely untrue, but this amount may be taken as the minimum. Of this minimum, according to circumstances, it may swell out to hundreds or to thousands.

The most remote, but upon the whole (its comprehensiveness considered,) the most productive source of profit, remains still behind. This is the endemial and all-infecting depravity, which it engenders and keeps alive in the community, by withholding the great check, by the application of which it would, in so vast a proportion, be kept from coming into existence. Were he assured of having his misconduct exposed and made public in the presence of a judge and a numerous auditory, as it would be were he under the obligation of meeting his adversary face to face, and

giving immediate answer to whatever pertinent questions were proposed to him, he would shrink from the exposure. As it is, at the expense of a series of lies,—from the disgrace of which he is eased by a society of lawyers, who are paid for originating and giving utterance to them—he being but the adoptive father (and not understood to be so) of them—he travels on in the road to iniquity—he perseveres in his course of injury without a check: expense is the utmost he has to fear. Thus it is, that the whole judicial system, with everything that belongs to it, is a perpetual hotbed for the raising a perpetual crop of depredation and oppression in every imaginable shape, with proportionable profit to Judge and Co. as often as it breaks out in the shape of litigation.

Such is the state of the disease. Now as to the remedy. A few words will suffice for the prescription of it. Of late years, publicity has received an unexampled extension, under the protection of a beneficent and comparatively wise Ministry,* and reformation of morals in a sensible degree is become the consequence. But in comparison of what it might be, the extent is still extremely narrow. Think what it would be, if in every instance of oppression in cases now called civil cases, the oppressor saw himself under the obligation of facing his victim or intended victim, in presence of a judge and a numerous and promiscuous auditory, and to make true answer (on pain as now of punishment for perjury) to every question which the oppressee, now no longer excluded from the judicatory by the expense of the toll-gate leading to it, might with the consent of the judge find cause to put to him. At present, opulence is to wrong in every shape (so long as individuals alone are regarded as being the objects of it) an effectual licence: in the here-proposed code, the licence will be withdrawn, and in the judicatory now become the arena of justice, the oppressor and the oppressed would meet on nearly equal terms.

In the English courts, the first act continues to be an act of extortion and oppression—of extortion practised on those who have money to pay for the chance of what is called justice.

By any one whose desire it was to do justice to the demand, would a refusal be given to hear what the demandant had to say on the subject?—to hear whether upon the face of his statement there was any ground for the demand—any just and sufficient cause, sufficient to afford a warrant for the vexation and expense?

No: he would hear what the applicant had to say; and, upon so doing, would in many instances do complete justice, or at any rate learn more of the real state of the case, than an English judge—common-law judge and equity judge put together—will (unless the defendant chooses it) at the end of eighteen months.

By this one act, a double injustice is perpetrated: injustice in the shape of extortion and oppression—extortion practised upon the man or the woman who is already injured—oppression on the man or the woman whose liberty is sold to the demandant, without inquiry, at the fixed price—the judge, for the sake of the profit received by himself, lending himself as an instrument to the profit of his accomplices and confederate worshippers in the professional branches of the law.

The judge's immediate profit from the extortion—though several times the amount of that price for a day's labour, which thousands and scores of thousands would be happy to get and cannot—formed at its origin a very considerable proportion of the amount of that income which would suffice for the subsistence of a family during a whole year. In the interval between that time and the present, that price has not been raised in any proportion approaching to that in which the value of money has fallen. But to the multitude of suits (the result of the prodigious increase of wealth—of wealth absolute and relative), what has been lost in the value of such items, has been amply compensated for by what has been gained by the increased number of those same items.

For the facility of giving exercise to oppression in this shape, where oppression is the object, not so much as an account, true or false is received or asked for, at the hands of the purchaser.

Afterwards, indeed, when the proposed defendant, in jail or out of jail, has by more fees made known his intention of appearing in that character, an account is made and received. But this account is made, not by the party himself, but by an attorney, who by the course of the court has been obliged to compose it of a parcel of lies, with only just so much truth in it as serves for a pretence for compelling the exhibition of a similar composition called a *plea*; the parties on both sides, for months or years, are kept thus at a distance from one another by the judge, while at long-protracted and altogether useless intervals, they are compelled to employ the lawyer to carry on the war of words: being composed of a mixture of lies, abuse, and nonsense, with or (as it may happen) without a small particle or two of relevant or irrelevant truth interspersed by accident.

Elicitation of evidence. Natural modes, oral or epistolary in all cases, according to circumstances, in respect of delay, vexation, and expense.

* Written December 1826.

Technical modes, diversified according to circumstances which make no difference with relation to aptitude or probability as to the correctness and completeness of the evidence elicited.

Unapt sources of diversification:—

1. The power and consequent denomination of the judicatory in which the elicitation is performed; *i. e.* whether a common-law court, or an equity court.

2. The relation borne by the examination to the suit. In a common law-court, no party on either side examined at all: in an equity court, a party on one side alone examined;—to wit, the defendant's side; and be examined in the epistolary mode only. An extraneous witness examined in the oral mode alone; and in this case in the utmost secresy, by the examining judge alone: no interrogative matter for counter-interrogatories, admitted to be given to the parties on both sides, or to a party on either side.

Natural procedure:—Form of litis-contestation, from beginning to end, exceptions excepted, oral. Exceptions are—1. Impossibility by reason of local distance; 2. Preponderant evil, in the shape of delay, vexation, and expense.

Technical procedure:—In equity practice, scriptitive, or say epistolary. Sole case in which oral discourse is received, that in which the examinee is either an extraneous witness, or a party litigant examined in the character of an extraneous witness.

Of the two effectually distinct functions, the requisitive and the probative, the exercise is mixed up in the same document—to wit, the bill.

The pursuer states the service he requires, alleges supposed facts, for the purpose of forming an efficient cause of right or title to the service demanded, or say required, at the hands of the defendant, and eventually at the hands of the judge, and exercises the evidence-elicitative function at the charge of the defendant. The evidence delivered, is what is called the *charging part* of the bill, containing in it, of necessity, a large portion of false and mendacious statement: the judicatory refusing all relief to every person who will not add to his requisition, a tissue of false and mendacious statements, known so to be by the judge.

In the common-law practice, the litis-contestation is called *pleading*; and that which is productive of delay, vexation, and expense in a special degree, *special pleading*.

Equity practice, to its own peculiar mode, adds incidentally the common-law mode. This is the case as often as, either instead of, or in conjunction with, what is called his *answer*, the defendant's lawyer delivers in, what is called a plea, or what is called a demurrer.

If and in so far as justice—that is to say, giving execution and effect to the correspondent portion of the substantive branch of the law—is the end in view, no part of the matter found in any of the books, under the head of pleading, or special pleading, will have any place in a procedure code having that same for its end in view: no portion is there of it, that is not completely useless. For the purpose of giving execution and effect to that same branch of law, or any part of it, no more information will be to be had from it than from the Koran.

Of the evidence, the judge commonly takes abridged memorandums; of the argumentation, none. Of these abridged minutes, in general no use is made; they are waste-paper and as such dealt with. For the moment, they serve to assist his recollection when giving his charge to the jury.

The sole case in which any use is made of them, is when application is made to another judicatory, without a jury, for a new trial, by and with another jury. In this case these minutes are conveyed, somehow or other, from the first judicatory to the second: the argumentation not.

In this case, instead of an appeal from the inferior judicatory to a superior, on the ground of the evidence and the argumentation delivered to the inferior judicatory,—is substituted an inquiry grounded on mutilated minutes, for the correctness and completeness of which, nobody is responsible,—for the purpose of a determination, whether evidence from the same source shall be elicited by another such inferior judicatory—no use whatever being made either of the argumentation or the evidence elicited by the inferior judicatory thus tortuously and awkwardly appealed from.

If to make good your claim, it happens to you to have need of your adversary's confessional evidence, you cannot have it without a suit in a judicatory called a court of equity: nor, in that judicatory, to any the most simple question can you make sure of an answer from him in so short a time as a year—to a question to which, if put to him by you in the presence of a judge, as in a small-debt court called a court of conscience, a single moment would suffice you for extracting from him an answer, and that an adequate one.

Think of a nation in which a man at the head of the law, will have the assurance to assert on all occasions, that justice was and is the object of this system.

Special pleading is a system of operations, by which, instead of the conjunct appearance of the parties in the first instance before the judge, making their respective allegations subject to responsibility compensational and punitional in case of falsehood, they are kept at a distance from the judge's chamber, for the purpose of causing to be delivered, at in-

tervals of weeks or months, their several allegations, in the form of ready written discourses penned by their respective professional asssistants, and without responsibility in any shape in case of falsehood. Special pleading is here utterly excluded. What is it? Answer: From beginning to end, a perfect nuisance; created and preserved in the teeth of the most obvious and recognised principles of justice.

In case of mendacity, or temerity of assertion, there will be responsibility, compensational and punitional: of evidence, the elicitation performed *vivâ voce*, by and in the presence of the judge. Throughout the whole course of the elicitation, questions to be put arising out of the answers. This is the course pursued wherever the obtainment of a correct, clear, and all-comprehensive conception of the appropriate facts belonging to the case, is really an object of desire. Under the actual system, the same individual in the character of a party, is constantly exempted from that responsibility to which that same individual would, in the character of a witness, be as constantly subjected. To what end, but that, under favour of this licence (coupled with the exclusion from the eye and the ear of the judge, and the scrutiny of cross-interrogations, with the aid of questions arising immediately out of the answers,) he may be not merely invited but forced to that course of false assertion, with factitious delay for months or years, out of which profit to the amount of hundreds or thousands of pounds is by this system of mendacity, fraud, and deception, extracted.

The system and course of procedure has for its professed object two things:—1. The obtaining a well-grounded assurance respecting the facts alleged on both sides; 2. The ascertaining the bearing of the law upon the facts, the existence of which is, on the ground of the several allegations, believed by the judge. Now then, as to the ascertainment of the facts. If this course were really conducive to the professed end in any one case, so would it be in every other: if in any one sort of judicatory, so would it be in every other. Conceive it now transported into the bosom of every family—into every committee of inquiry in the House of Commons—into the judicatory of every justice of the peace, and every sessions of justices of the peace. Suppose this course of inquiry, and no other, employed—But in vain should we tax our imagination in carrying it higher than the bosom of every family: for how many weeks together—for how many days together—upon this footing, could human society continue?

A project was on the carpet for giving to Scotland the benefit of English special pleading. The jury-court, it seems, cannot go on without it. Great indeed must be the embarrassment, thick the confusion, portentous the expense, when the enormity of it is too great even for those whose profit rises in proportion to it. Not much less, perhaps still greater, must be the embarrassment produced by the endeavour to substitute to this deleterious remedy another drawn from the same pharmacopœia. The project is altogether a curious one: by statute law to establish common law. A rather more obvious, more simple, and if justice were the object, a more effectual (or rather the only effectual) one, would be, by statute-law to establish statute-law. The only objection is, that the mode of conducting the business would (if made as it ought to be, and could be, made) be too effectual. To uncognoscibility, it would substitute universal notoriety; to the maximum, the minimum of vexation, delay, expense, and consequently, lawyers' profit.

An oblique and indirect or fictitious way, is the only way in which, *in this mode*, a conception, such as it is, as a *rule of action*, can be grounded upon; the assumption is, that by competent authority a rule of action has been established; and upon this assumption, false to the perfect knowledge of all those who build upon it, is grounded, on each occasion, the power they assume and exercise.

For these fifteen years past, the utter impossibility of accomplishing on this plan, in any tolerable degree, the ends of justice, has stood demonstrated: but not those ends—on the contrary, the ends diametrically opposite to them are on this occasion, as on every other, pursued where the workmen are lawyers, and, by the supineness of the people, suffered to take their own course.

Think of the impudence, as well as the wickedness of these men, so unaptly decorated with the name of judges, sitting with the doors of their judicatories shut against the parties;—the unhappy individuals kept out of sight and speech of each other, and of the judge, even when living both of them next door to the justice-chamber. And to what end? To what, but to fabricate a pretence (how shallow it is, every honest mind must see) for setting (at their expense) their respective lawyers to pelt one another with these masses of absurdity and nonsense.

Books upon books have been written and published, to show how this trash may be manufactured to the greatest advantage.—What a quantity of talent has been thus wasted!

Of this series of altercation, the whole use and purpose is the furnishing a pretence for the exaction of fees from the suitors, for the emolument of the lawyers of all classes and grades. Neither to the number of the instruments by which this course of altercation is carried on, nor to the length of any one of them (nor consequently to the expense of the whole,) are there any certain limits. As little are there to the length of the delay

thus organized and manufactured: the whole of it being completely useless. Many are the thousands of pounds to which the expense—not small the number of years to which the delay—has thus been known to be swelled.

All this while, not a syllable about the matter does the judge ever deign to know. The fees go some of them to his own immediate use, others to his profit in the shape of patronage, through the hands of his instruments and nominees; and for this remuneration not an atom of service does he perform.

The first and only occasion on which, if at all, any part of this altercation comes within his cognizance, is, when the stock of useless matter thus spun out comes at last to be exhausted, a determination comes to be taken on the subject of the whole together. Even then, not a tenth part of the contents of this lay stall is presented to the eyes or the ears of the judge. By the advocates on each side, those scraps are picked out, which in the hurry of the moment are regarded by them as best suited to their respective purposes, and the remainder is consigned to that neglect to which the whole is so well entitled.

In some cases, the string of altercation terminates in what is called an issue; and in these cases there is a question of fact which finds its way to another judicatory in which a jury is presided over by a judge.

Before me lies a work on the subject of special pleading, intituled "On the Principles of Pleading in Civil Actions."

On looking into this work, one sentiment that presents itself is a sentiment of regret called forth by the idea of the prodigious waste of mental labour and talent there employed, applied to a subject essentially worthless, and destined to disappear as soon as the light of truth shall have shone upon the subject. Raphael, painting his cartoons *al fresco*, upon a frozen pannel, is the image that presents itself.

By this work of his, the author superseded and converted into waste paper all the works of which before him the labour had been applied to this field. His turn it will next be, to be involved in the same fate.

Of no lover of justice can it fail to be the wish and desire to see applied to the furtherance of justice, that talent, which without any imputation on the author has hitherto had no other occupation than the giving facility to the occupation of obtaining emolument, by the giving increase to expense, of which injustice is the real fruit, under the name of justice.

Ask how much written pleadings there should be in a suit! Ask first how much chaff and powdered bones there should be in a quartern loaf!

Except for special and adequate reason, in every case, in every sort of case, for giving execution and effect to the portion of law in question, the course of procedure should be in everything the same: no difference in any one case, compared with any other: much less a difference, at the option of an individual on the pursuer's side.

This feature of natural procedure, compare it with the correspondent one in English technical procedure.

Over a bottle, or without a bottle before them, between a priest of the established religion, and a lawyer, a dispute takes place, and a scuffle ensues. It occurs to the priest to make an instrument of revenge out of this, and to betake himself to the law for vengeance.

The options that lie before him are—

1. Action.
2. Indictment.
3. Information, filed in the ordinary mode, or by leave obtained of the judge.
4. Information *ex officio*, filed by the attorney-general without need of such leave.
5. Libel in the ecclesiastical court, termed also spiritual court.

Suppose an information applied for in the ordinary way, and refused:—the attorney-general after this, would he take upon him to file an information *ex officio*, without leave applied for to the court. Who can say? He may or may not: it depends upon himself. If the assailant be a duke, and the person assaulted a priest, and nothing more,—probably in this case the attorney-general would not: but suppose the assailant a bishop, and the person assaulted, a Church-of-England priest, a Presbyterian layman, or what is worse, a Unitarian priest: very different now is the aspect worn by the case. Lord Northington, or Lord Thurlow either, would have damned them both, and bid them get about their business; but Lord Eldon has no curses—but great doubts.

In every one of these cases, the fact being by the supposition one and the same—not only the mode of proof, and the shape in which the evidence is elicited, is different, but even the source from which the evidence is admitted.

An action the priest or bishop cannot maintain, unless he has testimony other than his own at command: or unless he has the means of affording adequate inducement to some one, to give his evidence to the attorney, that it may be put into the brief by which the instructions are given to the advocate called counsel—through whose lips for this purpose it has to make its way to the ears of the court.

What is it that he asks for? Is it money? Though it be but a farthing, nothing he can say to get it is, even if it be said under the sanction of an oath, fit to be believed: he is accordingly excluded from saying it. Is it

revenge? Everything he can say for the hope of gratifying the different passions, is credible.

Antecedently to his visit to the grand jury, he may have made a like visit to a justice of the peace, complaining to him of the breach made of the king's peace. Here, then, is another judicatory.

Never yet was exemplified, it may be said, a case thus diversified as the above. Probably not: but if not, it really is not the fault of the law.

Record, in natural procedure—Record, in technical procedure.—The instrument denominated a record—what, if justice were the end in view, would be the contents of it? On the part of the judge, the definitive decree, with an account of the execution and effect given to it; and the operations, as well on the part of the judge as on the part of his subordinates, and the parties and extraneous witnesses (if any) included. In particular, the evidence on which the several operations performed by the judge had been grounded, would be introduced by the demand which had been made by the pursuer, and the passage or passages in the text of the law on which that demand had been grounded. If so it had happened that debate had taken place as to the import of the alleged portion of law, for the applicability of the facts proved on either or both sides, in relation to it,—here would be a question of law; and the interpretation put upon that occasion by the judge upon the law, would form an incidental mass of matter, proper to be entered. But this is a sort of occurrence which, comparatively speaking, would be rare. In a great majority of cases there never has been, even in the most unsettled state of the law (still less will there be under any tolerable improved state of the law), any discussion respecting the bearing of the law upon the facts. The common run of debts and common assaults are the occurrences by which the correspondent majority of the number of suits will have been produced. The substance of the matter, of which in every case the bulk of the record will be composed, will be the peculiar and characteristic part of the matter (being in each individual case different,) showing the ground on which the decree pronounced in that same individual case was founded. Other miscellaneous matters—such as any delay that had been produced either by the nature of the case, or by reluctance on the part of parties or witnesses, or misconduct on the part of judicial subordinates—will, for one purpose or other, need to be entered upon the record; but they will be merely casual and collateral to the direct purpose of the suit. That which will compose a constant and necessary part of the suit in every case is the matter of the demand itself—the matter of the defence, if any, and the evidence on which the demand and the defence, if any, was grounded. Thus much as to the matter belonging to the record. Now as to the matter, of which under the technical system of procedure in use in English practice, the instrument called a record is composed. Take in the first place the common-law courts—for in the sort of judicatories called equity courts, the contents of the instrument called a record (if indeed in these courts there be any instrument to which that denomination is authoritatively applied,) are altogether different; an unrebuttable presumption this against one or the other, and a presumption of no inconsiderable force against both.

But to begin with the common-law courts. How stands the matter with regard to the evidence?—what is done in relation to it? Answer: Absolutely nothing. On this subject, what it presents is, total and constant silence. Of what nature, then, is the matter of which this is so regularly framed and carefully preserved document is composed? Answer: With the exception of the decree called here judgment, which in each class of cases is the same, and a demand (which is never expressed in the terms in which it comes from the party whose demand it is,) scarce anything but what is either irrelevant, or to the knowledge of everybody, in every case, false. As to the judge, whose judgment it purports and pretends to be,—never, unless by some extraordinary accident, has it come within his cognizance. It is made for him by a sort of machinery, like the turning of a wheel.

As to the incidental occurrences before alluded to, entry is indeed, for the most part, if not in every instance, made of them: made, but on what instrument? Not on the record, but on this or that book, distinct from it, and not referred to in it. The consequence is, that to almost every purpose, the information afforded by the record, amounts to next to nothing. Not so as to mischievous purposes; for purposes of that description are served by it in abundance: mischief to the parties by the load of needles and useless expense—mischief to the whole community by the veil of obscurity and mystery with which it contributes to cover the whole system.

Of no breach of duty, however numerous such breaches may have been on the part of any of the actors of the judicial drama, does it afford any information: consequently, to no such breach of duty does it afford any check. Not a particle does it contain of evidence; but at the same time, not sparing is the quantity of matter composed of allegations: in these allegations, however, the matter is a medley composed of a mixture, in indistinguishable proportions, of truth and notorious falsehood.

Nothing do these pleadings (such is the name by which they are distinguished) — nothing do they contain of that matter, on which, under the name of evidence, the decree will have been grounded. What they are composed of, is, inferences, drawn, on both sides, by anticipation from the evidence expected, or pretended to be expected, to be elicited.

A proper record, as has been seen, would be a plain statement of every relevant occurrence that happens to have taken place in the course of a suit.

Sentence. — Special rational causes excepted, the imperative decree, or say the sentence, should be pronounced at the same time with the opinative decree.

As in non-penal, so in penal cases.

Special cause may be — time necessary for inquiry into the circumstances of the parties.

In English practice, when the means of repression is determined by the jury, as it is when compensation alone is awarded, the jury are never allowed a moment between the pronunciation of the opinative and that of the imperative decree: the opinative and imperative are one and the same.

But when the means of repression is determined by the judge, as it is where punishment, under the name of punishment, is awarded, an interval of days, weeks, months, perhaps even years, is made to have place between the pronunciation of the opinative decree by the jury, and the imperative by the judge.*

All this while, the defendant is kept in a state of mental torment: of costs, increase to a considerable amount is unavoidable; and to the quantum of the amount, there are no limits.

This determination, which the unlearned are held capable of coming to, and forced to come to accordingly at once, — is it that the learned judge, after his twenty years' lucubrations, is unqualified for coming to?

No: but the true and only cause of this uncertainty is the profit which it puts into the pockets of the lawyers of both classes, professional and official; and the power — the arbitrary and tyrannical power, which the judges have been suffered thus to place in their own hands.

In natural procedure, no needless concurrence necessitated.

In technical procedure, needless concurrence abundantly necessitated.

Examples of needless concurrence necessitated, are —

1. In non-penal law. In conveyancing: sinecure trusteeships.

Consequence, needless delay, vexation, and expense, in obtaining concurrence at the hands of the original trustees; much more at the hands of their representatives.

2. In procedure. Equity procedure: necessitating the concurrence of a defendant in the transfer made of his property, instead of making the transfer unin terventionally by the authority of the judicatory. Consequence, delay, &c. as above. To evilly-conscious defendants, a premium on non-compliance.

3. In penal procedure, under Rome-bred law: rendering the confession of the defendant necessary to his punishment; and for the obtaining of this confession, applying torture. Consequence, in case of inability to endure the torture, infliction of punishment on the innocent: in case of ability, impunity to the guilty, in respect of ulterior punishment.

Natural procedure. The judge, on issuing a mandate to any person, suitor or non-suitor, requiring him to do or to forbear from doing, in furtherance of justice, a certain act, to particularize beforehand the remedy or remedies, punitional or satisfactional, or both, of which, at the charge of the individual in question, application will be made, in the event of non-compliance with such mandate.

Technical procedure. For the purpose in question, judicial power needlessly employed in causing or endeavouring to cause the individual on whom the obligation is intended to be imposed, to give the appearance of consent by his signature attached to an instrument for that purpose appointed.

The evils attached to this practice are the following: —

1. Delay, vexation, and expense, — partly natural and unavoidable — partly fictitious; resulting from the performance of this needless and useless operation.

2. Needless and useless complication.

No reason is there, why in one case more than in another, consent on the part of a suitor should be necessary to give validity to the exercise appointed by the legislature to be given to the functions of a judge.

Natural Procedure — investigatorial process by means of indicative evidence — needful alike in all cases — employed in all cases.

Technical Procedure — confined to certain particular cases.

Natural. For each subsequent operation, time fixed according to the circumstances of each individual case, from the examination of the party, or his proxy, then present in the judicatory.

Technical. For each sort of operation, one and the same period of time fixed by a general rule. Thence, infinity to one, the time is either more or less than sufficient: if more

* This observation chiefly applies to those criminal cases which are tried in the Court of Queen's Bench, and not to the great mass of felonies and misdemeanors tried in the ordinary criminal courts, where the punishment is usually awarded immediately after the verdict is pronounced. — *Ed.*

than sufficient, the consequence is needless delay; if less than sufficient, needless expense employed in the endeavour, successful or unsuccessful, to obtain further time; there is also needless delay in this case.

The power of depriving another of his liberty, which the technical system gives to any one who applies for it, and without responsibility on his part, the natural system offers, it is true, to any one, but in no case without the responsibility by eventual punishment to which he is subjected in case of mendacity: so in the same manner is any extraneous party who is called as a witness: to which responsibility, when the case requires it, is added the obligation of finding security, either real, by property of his own, actually pledged by himself, or by a conjunct obligation entered into by a juridical bondman, who binds himself to concur in affording compensation to the defendant, in the event of any abuse of power exercised at his charge.

The female sex, that part of it which is in the married state, are more strongly interested in the establishment of the natural system of procedure, than are persons who belong to the male.

For cruelty on the part of the husband, at the charge of the wife, no relief is so much as professed to be given by any judicatories but those which belong to the ecclesiastical branch. But inadequate as is the remedy thus applicable, so great is the expense of application for a chance of it, as of itself suffices to establish a denial of justice in nineteen out of every twenty cases, not to say of ninety-nine out of every hundred.

The class which, being most exposed to injury in this shape, and as such is most in need of remedy, is the class to which all remedy is denied.

The fundamental principles of natural procedure are, —

1. Publicity maximized.
2. Exclusion of middle-men maximized.
3. Initiatory applications, not epistolary, but oral, maximized.
4. Penal security against falsity universalized, with warning of ditto.
5. No one made defendant, but on determinate and substantial grounds.
6. Epistolary statement receivable, to save delay and vexation, but never definitive; oral interrogation always addible.
7. Mode of procedure for the discovery of the appropriate truth, the same in all cases.
8. Delay, vexation, and expense, minimized in all cases.

The fundamental principles of technical procedure are —

1. Publicity minimized.*
2. Number of middle-men maximized.
3. Initiatory application by party to judge, not admitted.
4. Penal security against falsity, — extent minimized: distance from commencement of suit, maximized.
5. At the pleasure of every plaintiff, any person made defendant, antecedently to the allegation of any grounds determinate or undeterminate.
6. Recently established exception excepted, and that flagrantly inadequate, liberty of any man violated by confinement at the will of any man in the character of plaintiff.
7. Mode of procedure, on pretence of the establishment of truth, different in different cases.
8. Aggregate of delay, vexation, and expense, maximized. Fictitious delay established in an infinity of proportion, according to occasion and pretence.

APPENDIX A.

INITIAL SKETCH OF THE PROCEDURE CODE.

THE procedure code, as well as the judiciary establishment, has for its business the avoidance of the evils opposite to the several ends of justice.

Opposite to the declared ends are — 1. Misdecision. 2. Non-decision in cases which call for decision.

They accordingly have for their common business the providing of the requisite securities against these same evils.

To know and provide those securities, it will be necessary to ascertain the cause of these same evils.

These causes may be distinguished into —

1. Those which are liable to have their origin in the state of the judicial establishment
2. Those which are liable to have their origin in the system of procedure.

Non-decision has for its causes —

1. Non-institution, in cases which require institution.
2. Non-termination, in cases in which institution has taken place.

Causes of non-institution are —

1. Apprehension of partiality to the prejudice of the pursuer's side.
2. Inability to defray the expense.
3. Apprehension of expense, vexation, and delay, to an amount preponderant in value over the chance of success.

* See Judge Bayley's attempt to shut up police-offices in particular, on the ground that they are *not courts of justice*, *Morn. Chron. Oct.* 31 1824. Or see *Morn. Chron. 2d Nov.* 1824, "Manchester — Reverend Magistrate Hay's Charge to Grand Jury."

Causes of non-institution having their seat in the judicial establishment: —

1. Insufficiency in the number of the judicatories.

2. Multitude of judges in the same judicatory: apprehension thence, of needless delay on the several occasions for decision.

Causes of non-institution having their seat in the state of the procedure code: —

1. Magnitude of the expense of institution.

2. Apprehension of the magnitude of the expense, where there is much delay, incident to continuance, and preparatory to decision and execution, in favour of the pursuer's demand.

Causes of delay having their seat in the procedure code, with their correspondent securities: —

1. Fixation of time for the several steps.

Correspondent security against delay: exceptions excepted, reception and accersition of parties, witnesses, and evidence-holders in each suit, as soon as the time in the several cases admits: so as not to accerse or prehend any individual earlier than necessary.

2. The not having elicited in the most instructive manner the whole mass of the evidence bearing upon each fact in question.

Correspondent security: giving to each judge the faculty and the obligation of eliciting, in that same most instructive manner, as much as possible of that same mass of evidence, the whole if possible: except in so far as the expense, vexation, and delay, necessary to that effect, shall exceed the advantage gained in respect of superior probability of right decision: instead of assigning to one judge the elicitation of part of the evidence, and to another the elicitation of other parts; or to one and the same judge the elicitation of one part of it in one mode, to wit, a superior mode, and of other parts in another — to wit, an inferior mode.

The advantage, from the giving to one and the same judge who is to decide upon the fact in question, the whole of the evidence as above, the whole of it in the most instructive form, — will be pointed out elsewhere.

Admit at the same time the non-necessity of giving to the ultimately deciding judge the whole of the evidence, in so far as one part relates to one fact in question, another to another not connected with it.

At the same time, where it can be done without preponderant disadvantage in respect of delay, vexation, and expense, of course it will be best on every account, that the ultimately deciding judge should have for the basis of his decision all the several facts in question bearing upon the suit, together with all the masses of evidence respectively bearing upon them.

State now the wanton departures from this rule on the part of the English-bred and Rome-bred systems of procedure; with the causes of these aberrations—to wit, the inaptitude of the authors of the system, in respect of moral and intellectual aptitude: principally moral; they deriving to themselves a sinister advantage from the aberrations.

English-bred law. Aberrations.

I. Divers judicatories, employing each of them a different mode of procedure in this respect: whereas the course of procedure best adapted to the purpose of extracting the truth of the case — the most instructive mass of evidence in relation to the several facts, — is in every individual case one and the same, exceptions excepted.

Examples: —

1. Proceedings in case of an action in King's Bench, Common Pleas, or Exchequer.

2. Proceedings in case of an indictment in King's Bench.

3. Proceedings in case of an information in King's Bench.

4. Proceedings in case of an indictment in the Old Bailey, or on the circuit, in the court of Oyer and Terminer, or the General sessions of the peace.

5. Proceedings in the Rome-bred ecclesiastical and admiralty courts in a penal case.

6. Proceedings in the Rome-bred ecclesiastical and admiralty courts in a civil case.

II. In one and the same judicatory, proceeding in different courses in this respect, and accordingly giving to the suit in those several cases different denominations.

Examples: —

1. In the King's Bench, proceeding by action, indictment, and information: over and above the cases in which the judicatory exercises a controul over other judicatories.

2. In the Exchequer, proceedings by action, and by bill in equity.

III. In a suit, on the occasion of one and the same individual demand, transferring the suit from one judicatory to another in all cases indiscriminately, and without any reason derived from the particular circumstances of the individual case.

Examples: —

1. In an action, causing the suit to be commenced in the King's Bench at Westminster, and from thence carried to the court of Nisi Prius, either in Westminster or in London, at the sittings in or after term, or in some country town, at the court of assize, sitting no more than twice a-year for a few days in each town.

2. So on an indictment or information.

On the above occasions, at the commencement of the suit, in some instances proceeding without evidence: in others, with incomplete evidence on behalf of one side of the suit: in others, with incomplete evidence on the other side of the suit.

Examples: —

1. On an action proceeding without evi-

dence: allowing the pursuer to harass the defendant, and keep him in hot water for half a year, without having made any ground for his demand.

2. On an indictment, at the commencement eliciting evidence on the pursuer's side only: that evidence not perfectly elicited, and when elicited, not made any use of, on the occasion of the ultimate decision: made use of no otherwise than to the purpose of determining whether the suit shall go on, and evidence be elicited in a perfect manner, at Nisi Prius, half a year afterwards.

3. On the occasion of an information, commencing the suit by evidence, but by evidence elicited in the most uninstructive mode, and that evidence wasted by not being employed in forming the ground for the ultimate decision.

4. On the occasion of a bill in equity, eliciting evidence only on behalf of one side of the suit, to wit, the pursuer's, and that only the defendant's disserving evidence, the allegations of the pursuer not being admitted as evidence, but being knowingly and purposely allowed and required to be false: the elicitation of the evidence of extraneous witnesses being postponed to an indefinitely distant period, and then elicited in no other than a mode eminently uninstructive.

In the establishment of these arrangements, immorality has soared to such a pitch of impudence, as will be matter of astonishment to any future age, in which these abuses, and the others connected with them, shall have received a remedy.

In the case of an action at common law, subjecting any man, at the pleasure of every other man, to the torment of litigation for an indefinite length of time — for years together, if such be the tormentor's pleasure, without requiring any ground whatsoever.

In the case of a bill in equity, not only not requiring on the part of the pursuer any ground whatever, in the shape of true evidence, but admitting and even forcing him, on pain of miscarriage, to launch out into a string of false allegations, which being notoriously false, are not, and cannot be employed in the character of evidence.

Order of elicitation, as between evidence-holder and evidence-holder: —

No fixed order can be otherwise than mischievous. What order will be most convenient it is impossible to know, otherwise than from the particular circumstances of each individual case.

Rules and circumstances on which the choice depends: —

1. Of the evidence of two evidence-holders, A and B: if the evidence of A, and the effect of it, can be understood without reference to the evidence of B; while the evidence of B cannot be understood without reference to the evidence of A, let the evidence of A be first elicited.

If while neither can be understood without the other, or each may be understood without the other, while, in consequence of distance or ill health, one of them can be elicited before the other, let that one be first elicited, which, as above, is capable of being first elicited.

The first evidence capable of being elicited will of course be that of the applicant. But after that, it is impossible to decide correctly by any general rule, whether the evidence of the proposed defendant, if there be but one, or the joint demand or the evidence of a co-interessee of the applicant, will be to be heard to most advantage.

In regard to a defendant, all you can say in favour of his priority, as between him and a co-interessee of the applicant, is, that a decision should not be given to his prejudice, without his having an opportunity of being heard.

But this applies not without exception, to any but penal cases. For in civil cases, to a considerable extent, decisions affecting a defendant's interest will always require to be given in cases in which, by reason of distance or other causes, he cannot have been heard: only, in these cases the decision should be provisional, being liable to amendment in his favour, in the event of his showing sufficient cause.

In the English system, one circumstance that contributes to keep out of sight the demand for an indefinitely variable order of elicitation, is the vast distance between the time of the delivery of the demand, and the earliest time at which any ultimately employable evidence can be received; to wit, the half-year between the completion of the chain of pleadings, and (in country causes) the time of the circuit. So vast is this time, that in most cases all parties on both sides have time to prepare and produce their evidences. But though, in perhaps 99 instances out of 100, this time is some dozen or some hundred times more than sufficient, cases there will always be, in which it is not so much as sufficient. In these cases, application will be made for further time: and if the case be, that the defendant is in the wrong, and his mind in a state of evil-consciousness, here is another half-year at least gained to him for the enjoyment of the fruits of his iniquity, — to take advantage of his own wrong, — while the lawyers of both classes, official and professional, are made sharers in his sinister profit, by the price at which they concur respectively in the selling to him this undue advantage.

Waste of evidence coupled mostly with the elicitation of evidence in an unapt shape: —

1. Testimonial evidence elicited in its best shape, is elicited by *vivâ voce* reception and

undiquâque interrogation, accompanied *pari passu* with minutation, followed by recordation.

2. Elicited in its next best shape, it is elicited by scriptitive reception and *undiquâque* interrogation, in the same manner, backed by the assurance of the witnesses being upon occasion subjected to interrogation as to the same points *vivâ voce*.

Evidence in its best shape is not yet at its maximum of aptitude, unless subjected to amendment upon occasion — not only to re-elicitation in that same best shape, but to elicitation in the scriptitious shape.

Of course, no such supplemental evidence ought to be elicited without mandate from the judge, with or without previous opportunity afforded of opposition.

When evidence is wasted, the waste is the less to be regretted, when, being taken in an utterly unapt shape, or a less apt shape where it might have been taken in a perfectly apt shape, the shape it is taken in, is one in which it ought not to have been taken.

1. In the grand-jury hearing, antecedently to trial on indictment, what evidence is taken, is taken in the secret mode, without opportunity of counter-interrogation, or counter-evidence.

2. On the occasion of the equity mode of elicitation by bill, concluding with interrogatories, although, so far as regards the interrogatories, the shape is not inapt, yet being necessarily introduced by a tissue of notoriously mendacious assertions, it is in so far elicited in a supremely unapt shape.

In the affidavit shape, it is elicited subject to counter-evidence in the same bad shape, but not subject to counter-interrogation in any shape: much less subject to subsequential and emendatory *undiquâque* interrogation, in the oral shape. In this case, the shape in which it is received is one, in which it ought not on any occasion to be received.

In some sorts of suits, it is received in no other than this bad shape, and forms the sole groundwork which the ultimate decision can ever have. These are —

1. In civil cases, in all the judicatories, all contestation relative to incidental demands, made on the occasion of a suit, except that in which the ultimate decision, called the trial, has place.

2. On an information, it has place on the occasion of the preparatory inquiry, whether evidence elicited in the only good shape shall be received.

Here it is elicited altogether in waste: the more expensive mode of inquiry, by evidence in this its worst shape, being employed antecedently to the eventual employment of evidence in relation to the same facts, elicited in the best shape.

On the occasion of the preparatory examination by a justice of peace, in a case of felony, the evidence is in the first place taken in the best shape; but the whole of what on that occasion is taken in that best shape, is taken in waste, not being suffered to be employed on the occasion of the ultimate inquiry called the *trial*.*

On every account, the sinister interest of the judges is engaged in preserving the custom of taking the evidence in its worst shape: nor is it exposed to doubt, that it is by that same sinister interest, that the custom of taking it in those bad shapes was produced.

1. The interest of the purse. This interest they have given themselves by the price which immediately, or through the medium of their official subordinates and professional connexions, they have established themselves in the habit of exacting, by allowance from, and in partnership with, the government, which on those same occasions has given itself the advantage of the sale and denial of justice.

2. The interest of the pillow. In the best shape—the oral shape—the judges have the long and laborious occupation of superintending, and occasionally assisting, the elicitation of the testimony of the witnesses: that testimony is frequently drawn into tedious length, by inaptitude in all its shapes on the part of the witnesses; to wit, moral, intellectual, judicial, and appropriate relevant talent.

In its worst shape — the affidavit shape — it is presented to them through a channel the most agreeable to them of any in which it is possible to be presented: their old friends and associates impregnated with the same sinister interest and the same stock of ideas, acting in a sphere which is subordinate to their own, and by which their style of address is kept constantly in a strain of reverential homage.

APPENDIX B.

ACCOUNT-TAKING JUDICATORIES.

THERE is a certain species of cases, which will naturally appear to create a demand for a particular sort of judicatory, acting by a particular set of rules. These are the cases of which, in common practice, cognizance has been given to a special judicatory, distinguishable from the ordinary ones by the name of an *account-taking* judicatory.

By an account-taking judicatory, understand a sort of judicatory which has no other

* By a recent statute (6 & 7 W. IV. c. 114) a prisoner is entitled to have a copy of the evidence so taken before the justice; and to have it read at the trial. The judge always has this evidence before him; although, except in a very few cases, it can only be used by him as a guide in the examination of the witnesses.—*Ed.*

employment than the settling the balance, or say difference, due as between one party and another, in consequence of money or money's worth, disposed of at divers times, by each, at the desire or otherwise for the benefit of the other.

Of the common characteristics of these cases, the principal one, and that an essential one, is this: on the occasion of the inquiry carried on between the parties, opposition of interests has place, but not, unless by accident, actual contestation.

From this principal characteristic arises another, which accordingly may be termed a derivative one: the evidence on which the decision is grounded consists mainly of a piece of written evidence, the trustworthiness of which has not for its assurance the customary securities of counter-interrogation, or, by means of the ceremony called an oath, punishment in case of falsehood: a *voucher* is, in English practice, the name given to a piece of evidence to which this effect is given.

Of a judicatory of this sort, the ordinary occupation consists accordingly in the reception given by the judge to the vouchers presented by or on behalf of one of the parties. On one side of the account stand the articles which the party admits that he has received; of which reception, no other proof, it is manifest, need be required: on the other, the articles which he alleges he has delivered, or caused to be delivered; and of the several acts of the delivery, or assemblages of acts of delivery, the several vouchers are exhibited as conclusive evidence.

But ere an account can be settled in a manner conformable to justice, decision on the subject of divers collateral demands may incidentally require to be delivered: each such demand being of a nature to be contested, and thereby constituted the matter of a distinguishably-separate suit. Of these demands, examples are as follows: —

1. Application for the disallowance of a voucher, on the ground of its alleged unauthenticity.

2. Allegation of a fraud, in respect of the non-performance or mal-performance of some service, the due performance of which is attributed by the voucher.

3. Application for liberty to exhibit evidence of the performance of some service, of which it is alleged by one party that it was rendered by him to the other, but that no voucher for it was received; or that, an appropriate voucher for it having been received, was by some accident lost: in any of which cases, either the value of the service will of course be lost to the applicant, or in proof of its having been performed, such other evidence as the case happens to afford must be exhibited and received.

An account brought before a judge, to be settled by him between the parties, may thus be considered as a congeries of suits, each party in case of contestation being pursuer in respect of the payment of every sum of money, or other service, which he alleges as being due to him: and defendant, in respect of each such service as, being demanded at his hands, he refuses to perform. Here, then, are in this, as in other cases, two parties interested, and a judicatory which on the subject of each such demand is to decide between them.

Certain cases, however, there are, and even to a vast extent, in which on no more than one side is any party seen acting.

On the other hand, considering the variety of the matter above designated, under the name of collateral matter, that would be liable to come under consideration, — no sufficient reason appears, why on this occasion the qualifications requisite on the part of an ordinary judge should be regarded as superfluous.

Still, however, a reason occurs, and one which seems a sufficient one for committing this species of matter to a particular species of judicatory: this is, that a judge-depute, whose time was exclusively or principally employed in the judication of business of so narrow a description, could not thereby be in a situation to acquire experience extensive enough for forming the qualification of a judge at large.

On this and other accounts, a competent person would scarcely be willing to accept, for this business, a pecuniary remuneration so small as what would content him in the other case.

Business of this sort being an object of general dislike, a judge-principal would not be able to obtain deputes in sufficient numbers, on any other terms than, in the case of each individual, an engagement not to employ him on this business.

On all these accounts, the most eligible arrangement seems to be, the committing the location of functionaries for this purpose to the justice-minister at once, or that that minister should locate an audit judge-principal, and he locate deputes in such number as he should find sufficient.

APPENDIX C.

BRITISH INDIA—JURY SYSTEM.

DEAR SIR,—In consequence of the good countenance shown last session in both Houses, when the subject of juries was incidentally brought forward, Mr. Wynn appears to have set himself to work at something — I could not exactly discover what. But there is much virtue in a beginning, and as I know Mr. Wynn to have been seeking information on the subject from the very best authority he could resort to — Sir A. Johnstone — I am

full of hopes, trusting as I do, that you will keep your eye on the thing in the House, so that the Indian minister may be encouraged as well as watched.

I would indeed it were possible to send out *Sir A. Johnstone* to India, to introduce native juries there, as he so well effected it in Ceylon — for I confess I have many fears for the result of the experiment on account of the unfriendly hands to which it must necessarily be entrusted. What judge from Scotland to Bengal, "Usque Auroram ad Gangem," ever *cordially* loved to divide his power with a jury? But in this case, we have not to contend with that proclivity alone, or in its simplest form. The king's judges in the royal courts at the three great cities (Calcutta, Madras, and Bombay), will probably not much like having to consult with juries henceforth in *civil (quasi-criminal)* cases, in making assessment of damages — or where the parties desire a jury-verdict in preference to a bench-verdict. But the king's judges have never been accustomed to act in *criminal* matters without juries, and they will rather feel favourable than otherwise to the admission of natives and half-castes.

The danger I fear is from the Company's servants, who will have the sole conduct of the experiment in the *provincial* courts, by far the most important part of it, inasmuch as *there* it is wholly new to the people as to the judges; and is in fact a politic and scarcely perceptible beginning — of teaching our subjects to take a share in self-government, and of giving them an interest in the support of our foreign regime. To this I have no sort of doubt the Company and their servants will bear no good-will: it is not in the nature of things they should, if we consider who *they* are, and how chosen, that represent the Company in England — and who *they* are, and how brought up, as a separate caste from early youth, that compose the servants abroad, and are the monopolisers of all office and power there: — rising from the bottom to the top of a list of placemen, all aspiring to hoard and bring away all they can; bound to India by no sympathies — no permanency — no root in the land.

In the infancy of the meditated native juries, everything will depend upon the *provincial judges*. But where shall we look for a liberal philanthropic mind like Sir A. Johnstone, anxious that the thing should work well; careful in selecting — in instructing — in discreetly leading the inexperienced and ill-qualified jurors in the early stages of the institution? The native officers of our Sepoys have all risen from the ranks — are all taken from the *humble* classes of society — *métayers*, *dairymen*, and *soldiers' children*; but they have a plain and simple code of laws to deal with (not simpler than *might easily be compiled* for all ordinary issues, civil or criminal, fit for our proposed juries;) and they are instructed discreetly in the law, and have the evidence expounded by a European judge-advocate in general courts-martial — and by a European officer of their regiment completely skilled in minor courts. In consequence, though the entire administration of military law has been left in the hands of these native juries, as they may be called, even in the most ticklish times, they *are scarcely ever known to do wrong*. This has prevailed for sixty or seventy years! From the same classes, or better classes of society, the *civil* jurors may be taken; and the thing, if not loaded with absurd and revolting oaths too much, may be converted into a mark of distinction. But all this depends on the Company's servants! The European officers of the Sepoys are also Company's servants: but mark the difference of position as to *checks*. The European judge-advocate is selected for his talents out of a mass of candidates, all quick to discern his faults, and aspire to his shoes, if he neglect his duty. The court in which he and his native jurors sit is an *open tribunal* — white and black auditors frequent it. The native officers are commissioned — they must be treated as gentlemen; not bullied or put down with contempt. The proceedings are all recorded (saving the opinions of individuals, which are strictly *secret*;) they must go up to a division commanding officer, who may be of the king's service, — to the judge-advocate to report on — to the commander-in-chief (who is always a king's officer,) and therefore of a different corps from the original European judge. Finally, they *may* be handed up to government, and are published invariably in general orders, with the comments of the commander on them, to every regiment. But what checks are provided for the conduct of a Company's civil servant? What shall efficiently controul exaction and tyranny, if he be capable of such? What shall keep down his ill-will to the jury system? his jealousy of the partial eclipse which his autocracy in the province must suffer? his habitual insolence of office? the white man's — the rich man's — the civil servant's feelings, towards the black — the poor — the "low" man? Nothing but the feeble, formal, "regular channel" controul of official superiors, distant many degrees of latitude, or longitude perhaps — and all belonging to the same corps with the supposed offender. There is no vicinage of his equals — no community to stand in awe of, no one independent of his direct authority or indirect influence! Yes: the tribunals are open — open to the poverty-blasted, ignorant, timid black man, who ventures to wage such a war with the great man of his district: — "open" — but with every stage

loaded with costs, stamps, and law-taxation, greater in proportion to the extreme indigence of our well-ground eastern subjects, than those of England, — and more remote, more inaccessible, than even our courts.

If no better checks than all this be provided, the attempt to put natives on juries will utterly fail. I know of but one Company's judge in India to whom *I* would commit such a charge with full confidence, *****. But he is of the "liberal faction," and not in favour with his brethren. What, then, is to be done to prevent this excellently meant measure from miscarrying? There is but one efficacious remedy, and to that must we come at last in India as at home — publicity! Shame and intimidation are its offspring, and bodies or classes of men, I fear, in all countries, must be governed by these, and by nothing else so effectually. None are so powerfully and beneficially acted on by "publicity" and its consequences, as judges—to none is it more happily applicable. It is not the mere opening the doors of a court, at which few attend, and fewer still can interpose on the spot to resist abuse: it is the reporting of those present, to those absent — by those who have quick ears and ready memories or glib pens — to those at a distance, who are capable of appreciating and judging, and acting, if need be. The press—the free and anonymous comments of the press, can alone do this, and terrify evildoers Let its abuse be subject to all the severity of your libel laws; superadd thereon, the six-act penalty of *deportation*, if you will: but let the penalties be inflicted after trial, with or even without a jury, so it be done judicially—done after hearing and determining in public; and not vindictively, privately, summarily, and by the executive power — by the fellow-servants of the offended functionary.

The press, to do any good in a country like India, must be *anonymous* — 1*st*, Because who will dare openly to "bell the cat," in a country where the fortunes of every man depend on the nostril breath of the despots and their servants, to whom England has delivered over India, lease-bound hand and foot. *Secondly*, Because there would be a violation of decorum in a servant criticising his master, an inferior his superior's misdeeds, which is entirely saved by the anonymousness of the criticism: separating effectually the question of "*who writes*," from that of "*what is written?*" Now at this unhappy moment in India, a man may not *report* in the newspapers the *verbatim* completed proceedings of a court of justice: still less make any *comments* on what passes. Very recently, Mr. ****, the editor of a Bombay newspaper, has been transported at a few days notice to England *(via China)* — ruined, in short, for reporting what he offered to prove, by multitudes of witnesses on oath, to be a literal and true report of what passed in court. *He was not allowed to do this*, but was required by Governor **** and his council, at the instigation of the King's judges — **** and **** — to admit that what he had published was *false*, or to be ruined. He was accordingly transported, the judges not choosing to exert their power, *in their own court*, of raising the question of contempt. Such are the facts: they speak for themselves.

If such be the system approved of at home and to be acted on abroad, of what avail can it be to make judicial reforms of any sort? but, in particular, what rational hope can there be of effecting so great a change as that of admitting the natives of India to take any *real* share in the administration of justice among themselves? But we shall be told, if the press be set free to touch on judicial matters, who shall restrain it in *politics*, or hinder it from becoming the vehicle of safe complaint against oppression? As to the latter, what honest man or honest government, considering itself the equal protector of *all* its subjects, would *wish* to shut up *any* avenue by which the complaints of the weak and the wronged may possibly reach its ear, or at least intimidate the wrongdoer? But in respect to political discussion through the press, this very *Governor* himself has admitted, as you may see in the Oriental Herald, that there is not a shadow of danger in respect to the *natives*. And most true it is, that not one in a million is capable of comprehending the most common discussions on politics, though able enough to understand the use of publishing their complaints aloud. It is for the sake of keeping down the Europeans and half-castes, and of keeping up the arbitrary system of the Company, and gratifying the haughtiness and official insolence of the privileged caste, that the authorities in Leadenhall-street and in India, to a man, oppose anything like freedom of opinion. They feel, perhaps, that the Company could not long stand against the force of public opinion, and are acting in natural self-defence.

Are you aware, that in India there are no *institutions*, no *bodies*, no *corporations*, — no *two men*, in short, who have a right to lay their heads together, and petition the government, using the plural *we?* A single individual may no doubt "bell the cat," if he please, but all meetings are as strictly forbidden, as the use of types or expurgated books is prohibited even to Europeans! In the old slave colonies of England, or the United States, where the state of society is so fearfully delicate, there are no *laws* against the press generally: but woe to the printer or editor who should use his, to excite the slaves to revolt, or even run hard against the vitiated feelings of the slave-owning majority! If he did not starve for want of congenial

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readers, woe to him if he should come before an infuriated jury of overseers and slave-attorneys, on an easily trumped-up indictment for seditious libel! Can we not, then, in India, a handful as we are of whites, trust sufficiently to the "esprit de corps," and the sense of common safety, to deter an Editor (if want of subscribers could not cool the Quixote) from exciting revolt, and persuading the native to cut his own and his fellow Europeans' throats?

But I shall not further pursue this branch of the argument: my object is mainly to show, that without a press, without institutions, without rights of person or property, without the privilege of using freely their skill, industry, and capital, without safe and organized means of complaint or petition,— Europeans, who in India are as yet the only considerable class capable of estimating and influencing the conduct of public men, are powerless and helpless; and that the introduction of jury-trial, or any other improvement that depends materially on the conduct of those who are to set the machine in motion, to be other than a mockery and waste of time, must be accompanied by some *safe* and easy means of *embodying* public opinion *on the spot*, where alone it can have that force in reacting on the judges, of which delay and distance so effectually deprive the injured when it has to travel hither.

1825. * * * * *

To Jeremy Bentham, Esq.

From the Right Honourable Sir Alexander Johnston,

TO THE

Right Honourable Charles W. Williams Wynn, President of the Board of Controul.

26th May 1825.

DEAR SIR, — I have the pleasure, at your request, to give you an account of the plan I have adopted, while Chief-Justice and First Member of His Majesty's Council in Ceylon, for introducing trial by jury into that island, and for extending the right of sitting upon juries to every half-caste native, as well as to every other native of the country, to whatever caste or religious persuasion he might belong. I shall explain to you the reasons which induced me to propose this plan, the mode in which it was carried into effect, and the consequences with which its adoption has been attended. The complaints against the former system for administering justice in Ceylon were, that it was dilatory, expensive, and unpopular. The defects of that system arose from the little value which the natives of the country attached to a character for veracity, — from the total want of interest which they manifested for a system, in the administration of which they themselves had no share, — from the difficulty which European judges, who were not only judges of law, but also judges of fact, experienced in ascertaining the degree of credit which they ought to give to native testimony, — and, finally, from the delay in the proceedings of the court, which were productive of great inconvenience to the witnesses who attended the sessions, and great expense to the government which defrayed their costs. The obvious way of remedying these evils in the system of administering justice, was — *first*, To give the natives a direct interest in that system, by imparting to them a considerable share in its administration; *secondly*, To give them a proper value for a character for veracity, by making such a character the condition upon which they were to look for respect from their countrymen, and that from which they were to hope for promotion in the service of their government; *thirdly*, To make the natives themselves, who from their knowledge of their countrymen can decide at once upon the degree of credit which ought to be given to native testimony, judges of fact, and thereby shorten the duration of trials, relieve witnesses from a protracted attendance on the courts, and materially diminish the expense of the government. The introduction of trial by jury into Ceylon, and the extension of the right of sitting upon juries to every native of the island, under certain modifications, seemed to me the most advisable method of attaining these objects. Having consulted the chief priests of the Budhoo religion, in as far as the Chingalese in the southern part of the island — and the Brahmins of Ramiseram, Madura, and Jafua, in as far as the Hindoos of the northern parts of the island were concerned, — I submitted my plan for the introduction of trial by jury into Ceylon to the governor and council of that island. Sir T. Maitland, the then governor of the island, and the other members or the council, thinking the adoption of my plan an object of great importance to the prosperity of the island, and fearing lest objections might be urged against it in England, from the novelty of the measure — (no such rights as those which I proposed to grant to the natives of Ceylon ever having been granted to any native of India) — sent me officially, as first member of the council, to England, with full authority to urge in the strongest manner the adoption of the measure, under such modifications as his Majesty's Ministers might on my representations deem expedient. After the question had been maturely considered in England, a charter passed the Great Seal, extending the right of sitting upon juries, in criminal cases, to every native of Ceylon, in the manner in which I had proposed; and on my return to Ceylon

with this charter in November 1811 its provisions were immediately carried into effect by me. In order to enable you to form some idea of the manner in which the jury-trial is introduced amongst the natives and half-castes of Ceylon, I shall explain to you—*first*, What qualifies a native of Ceylon to be a juryman;

2*dly*, How the jurymen are summoned at each session;

3*dly*, How they are chosen at each trial; and,

4*thly*, How they receive the evidence and deliver their verdict.

Every native of Ceylon, provided he be a freeman, has attained the age of 21, and is a permanent resident in the island, is qualified to sit on juries. The fiscal, or sheriff of the province, as soon as a criminal session is fixed for his province, summons a considerable number of jurymen of each caste, taking particular care that no juryman is summoned out of his turn, or so as to interfere with any agricultural or manufacturing pursuits in which he may be occupied, or with any religious ceremony at which his caste may require his attendance. On the first day of the session, the names of all the jurymen who are summoned are called over, and the jurymen, as well as all the magistrates and police-officers, attend in court, and hear the charge delivered by the judge. The prisoners are then arraigned; every prisoner has a right to be tried by thirteen jurymen of his own caste, unless some reason why the prisoner should not be tried by jurymen of his own caste can be urged, to the satisfaction of the court, by the advocate-fiscal (who in Ceylon holds an office very nearly similar to that held in Scotland by the Lord Advocate;) or unless the prisoner himself, from believing people of his own caste to be prejudiced against him, should apply to be tried either by thirteen jurymen of another caste, or by a jury composed of half-castes or Europeans. As soon as it is decided of what caste the jury is to be composed, the registrar of the court puts into an urn, which stands in a conspicuous part of the court, a very considerable number of the names of jurymen of that class out of which the jury is to be formed: he continues to draw the names out of the urn, the prisoner having a right to object to five peremptorily, and to any number for cause, until he has drawn the names of thirteen jurymen who have not been objected to. Those thirteen jurymen are then sworn, according to the forms of their respective religions, to decide upon the case according to the evidence, and without partiality. The advocate-fiscal then opens the case for the prosecution (through an interpreter if necessary) to the jury, and proceeds to call all the witnesses for the prosecution, whose evidence is taken down (through an interpreter if necessary, in the hearing of the jury,) by the judge; the jury having a right to examine, and the prisoner to cross-examine, any of the above witnesses. When the case for the prosecution is closed, the prisoner states what he has to urge in his defence, and calls his witnesses; the jury having a right to examine, and the prosecutors to cross-examine them, their evidence being taken down by the judge. The prosecutor is seldom or ever, unless in very particular cases, allowed to reply, or call any witnesses in reply. The case for the prosecution and for the prisoner being closed, the judge (through an interpreter when necessary) recapitulates the evidence to the jury from his notes, adding such observations as may occur to him on the occasion. The jury, after deliberating upon the case, either in the jury-box, or if they wish to retire, in a room close to the court, deliver their verdict through their foreman in open court; that verdict being the opinion of the majority of them. The most scrupulous care is taken that the jury never separate, nor communicate with any person whatever, from the moment they are sworn, till their verdict is delivered as aforesaid, and has been publicly recorded by the registrar. The number of native jurymen of every caste in Ceylon is so great, and a knowledge beforehand what persons are to compose a jury in any particular case, is so uncertain, that it is almost impossible for any person, whatever may be his influence in the country, either to bias or to corrupt a jury. The great number of jurymen that are returned by the fiscal or sheriff to serve at each sessions—the impartial manner in which the names of the jurymen are drawn—the right which the prisoner and prosecutor may exercise of objecting to each jurymen as his name is drawn—the strictness which is observed by the court in preventing all communication between the jurymen when they are once sworn, and every other person, till they have delivered their verdict, give great weight to their decision. The native jurymen being now judges of fact, and the European judges only judges of law, one European judge only is now necessary, where formerly, when they were judges both of law and fact, two, or sometimes three, were necessary. The native jurymen, from knowing the different degrees of weight which may safely be given to the testimony of their countrymen, decide upon questions of fact with so much more promptitude than Europeans could do, that since the introduction of trial by jury no trial lasts above a day, and no session above a week or ten days at farthest; whereas, before the introduction of trial by jury, a single trial used sometimes to last six weeks or two months, and a single session not unfrequently for three months. All the natives who attend the courts as jurymen obtain so much information during their attendance, relative to the modes of proceeding and the rules of evidence,

that since the establishment of jury-trial, government have been enabled to find among the half-caste and native jurymen, some of the most efficient and respectable native magistrates in the country, who, under the controul of the supreme court, at little or no expense to government, administer justice in inferior cases to the native inhabitants. The introduction of the trial by native juries, — at the same time that it has increased the efficiency and dispatch of the court, and has relieved both prisoners and witnesses from the hardships which they incurred from the protracted delay of the criminal sessions, — has, independent of the savings it enabled the Ceylon government to make immediately on its introduction, since afforded that government an opportunity of carrying into effect, in the judicial department of the island, a plan for a permanent saving of ten thousand pounds a-year, as appears by my report, quoted in page 8 of the printed collection of papers herewith sent.* No man whose character for honesty or veracity is impeached, can be enrolled on the list of jurymen. The circumstance of a man's name being upon the jury-roll is a proof of his being a man of unexceptionable character, and is that to which he appeals, in case his character be attacked in a court of justice, or in case he solicits his government for promotion in their service. As the rolls of jurymen are revised by the supreme court at every session, they operate as a most powerful engine towards making the people of the country more attentive than they used to be, in their adherence to truth: the right of sitting upon juries has given the natives of Ceylon a value for character which they never felt before, and has raised in a very remarkable manner the standard of their moral feelings. All the natives of Ceylon who are enrolled as jurymen, conceive themselves to be as much a part, as the European judges themselves are, of the government of their country; and therefore feel, since they have possessed the right of sitting upon juries, an interest which they never felt before in upholding the British government of Ceylon.

The beneficial consequence of this feeling is strongly exemplified in the difference between the conduct which the native inhabitants of the British settlements in Ceylon observed in the Kandian war of 1803, and that which they observed in the Kandian war of 1816. In the war between the British and Kandian governments in 1803, which was before the introduction of trial by jury, the native inhabitants of the British settlements were for the most part in a state of rebellion: in the war between the same governments in 1816, which was five years after the introduction of trial by jury, the inhabitants of the British settlements, so far from showing the smallest symptom of dissatisfaction, took, during the very heat of the war, the opportunity of my return to England to express their gratitude through me to the British government, for the very valuable right of sitting upon juries, which had been conferred upon them by his present Majesty, as appears by the addresses contained from page 16 to page 50 in the printed papers herewith sent. The charge delivered by my successor, the present chief-justice of the island, in 1820, contains the strongest additional testimony which could be afforded of the beneficial effects which were experienced by the British government from the introduction of trial by jury amongst the natives of the island. See that charge in pages 289 and 290 of vol. x. of the Asiatic Journal. As every native juryman, whatever his caste or religion may be, or in whatever part of the country he may reside, appears before the supreme court once at least every two years, and as the judge who presides, delivers a charge at the opening of each session to all the jurymen who are in attendance on the court, a useful opportunity is afforded to the natives of the country, by the introduction of trial by jury, not only of participating themselves in the administration of justice, but also of hearing any observations which the judges in delivering their charges may think proper to make to them, with respect to any subject which is connected either with the administration of justice, or with the state of society or morals, in any part of the country. The difference between the conduct which was observed by all the proprietors of slaves in Ceylon in 1806, which was before the introduction of trial by jury, and that which was observed by them in 1816, which was five years after the introduction of trial by jury, is a strong proof of the change which may be brought about in public opinion, by the judges availing themselves of the opportunity which their charging the jury on the first day of session affords them, of circulating among the natives of the country such opinions as may promote the welfare of any particular class of society. As the right of every proprietor of slaves to continue to hold slaves in Ceylon, was guaranteed to him by the capitulation under which the Dutch possessions had been surrendered to the British arms in 1798, the British government of Ceylon conceived, that however desirable the measure might be, they had not a right to abolish slavery in Ceylon by any legislative act; a proposition was however made on the part of government by me, to the proprietors of slaves in 1806, before trial by jury was introduced, urging them to adopt some plan of their own accord, for the

* This alludes to the documents and evidence given before a select committee of the House of Commons, which was appointed, about sixteen years ago, to inquire, amongst other matters, into the judicial institutions in India. — *Ed.*

gradual abolition of slavery. This proposition they at that time unanimously rejected. The right of sitting upon juries was granted to the inhabitants of Ceylon in 1811: from that period, I availed myself of the opportunities which were afforded to me, when I delivered my charge at the commencement of each session to the jurymen (most of whom were considerable proprietors of slaves,) of informing them of what was doing in England upon the subject of the aboli ion of slavery, and of pointing out to them the difficulties which they themselves must frequently experience in executing with impartiality their duties as jurymen, in all cases in which slaves were concerned. A change of opinion upon the subject of slavery was gradually perceptible amongst them; and in the year 1816, the proprietors of slaves, of all castes and religious persuasions in Ceylon, sent me their unanimous resolutions, to be publicly recorded in court, declaring *free* all children born of their slaves after the 12th August 1816, which in the course of a very few years must put an end to the state of slavery, which had subsisted in Ceylon for more than three centuries.

I have the honour to be,

Dear Sir, yours very faithfully,

(Signed) Alexr. Johnston.

THE

RATIONALE OF REWARD.

BY

JEREMY BENTHAM.

(ORIGINALLY PRINTED IN 1825.)

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ADVERTISEMENT BY THE EDITOR.

THE history of the present Work is somewhat curious: it is extracted from two sets of manuscripts, differing considerably as to their arrangement; the one in French, and the other in English, written by Mr. Bentham between forty and fifty years ago; and which do not appear to have been ever confronted together.

Both these manuscripts, with Mr. Bentham's papers on Punishment, were, at the desire of M. Dumont, placed in his hands, and, together with some few additions from his own elegant pen, form the matter of the work published by him (at Paris in 1811) under the title of *Théorie des Peines et des Récompenses.* Of this work three editions have been printed in France, and one in England: the "Rationale of Reward" occupies the second volume.

In preparing it for its appearance before the English public, the Editor has taken the above volume as the groundwork of his labours; but having availed himself wherever he could of the original manuscripts, *his* will, in many instances, not be found a literal translation of M. Dumont's work.

The additions made by M. Dumont are marked out, where distinguishable, by appropriate indications. One of these additions being at variance with Mr. Bentham's *present* opinions, has given rise to the remarks which immediately follow.

EDITOR *of Original Edition.*

REMARKS BY MR. BENTHAM.

"Catherine's Scale of Ranks:" — "Bentham or Dumont, on Pensions of Retreat?" — which you please. — You ask my present thoughts: — I am all obedience. Allow me only to name the place. Not in your work, but let it be in a sequel I am preparing for it. From that which you have so kindly made yours, those wicked thoughts would scare away readers, whom, if content with what you give them from my first friend, that sequel may have a chance for. In that production may be seen, not in description only, but *in terminis*, the arrangements, which, after from forty to fifty years for reflection, exhibit the practical — I do not say the *now practicable* — result of the principles of yours: and *that* cleared (forgive my saying so) of what now shows itself to me as dross. Nor yet will it draw readers from yours; — for in yours alone will be found discussions, explanations, and reasonings at length; in the new one (except where the opposite officially avowed principles are examined) little else than results.

Official Aptitude Maximized; Expense Minimized. In these words you have the title of a plan of official economy and education that gives denomination to the whole, and an indication of the matter of the first and principal part. Send your readers, if you have any, to that work. There, with official economy, and official education, they may see national growing out of it — added, and *that* without need of additional description or expense. There, confronted with Radical, they may see Whig and Tory economy, and take their choice. I say Whig and Tory; for these two are one.

As to Catherine and her ranks, they rank not quite so high with me now as then. Pensions of retreat would be invited to make their retreat from your pages, were it not for my respect for editors and readers. In my own work may be seen a picture of them, painted in those colours which now appear to me their proper ones.

"Revise?" Impossible: not to speak of my doing you more harm than good. In the French alone, the "Pensions of Retreat" have already cost me — I had almost said lost me — more days than I can endure to think of: I who have so few left, and work enough left for a hundred times the number. What I have found possible, I have done, — looking over the titles of the chapters and sections (still in the French alone) and, in relation to them, submitting what appears to me an appropriate wording, together with some little alterations and additions which presented themselves to me as amendments.

THE

RATIONALE OF REWARD.

PRELIMINARY OBSERVATIONS.

THE greatest happiness of the greatest number ought to be the object of every legislator: for accomplishing his purposes respecting this object, he possesses two instruments — Punishment and Reward. The theories of these two forces divide between them, although in unequal shares, the whole field of legislation.

The subject of the present work is Reward; and not reward alone, but every other use which can be made of that matter of which rewards may be formed.*

In the following work, the different sources from which rewards may be derived are examined; the choice which ought to be made between the different modifications of which reward is susceptible, is pointed out; and rules are laid down for the production of the greatest effect with the least portion of this precious matter.

On the one hand, indication is given of the venom, more or less concealed, which is included in the employments which have too commonly been made of it; and an attempt has been made to take away from others certain imputations which the enthusiasm of virtue has cast upon them.

The limits have been traced between the fields of reward and punishment; the springs of that mechanism developed, whence those laws arise to which the power is attributed of executing themselves, and directions given for that combination of remedies, the sweet with the bitter, whereby so happy a union is produced between interest and duty.

The advantages of a system of remuneratory procedure are pointed out; an idea given of the course it ought to take; and an enumeration made of the uses of the matter of reward which are not remuneratory.

The nature and effects of salaries and other official emoluments are inquired into; the nature and degree of the encouragement proper to be afforded to the arts and sciences is discussed; and, finally, the question, — How far it is possible beneficially to apply artificial reward to the encouragement of production and trade, is considered.†

* Everything which can be given in the shape of reward may be called *matter of reward.* This abstract term is necessary, since in many cases, without being reward, this matter may be employed for the same purposes as reward; whilst there are other cases in which it ought to be employed for other purposes.

† In this edition, the portion of matter which constituted Book IV. has been detached, and will be printed, with additions from the MS., as a "Manual of Political Economy."

BOOK I. — OF REWARDS IN GENERAL.

CHAPTER I.

DEFINITIONS.

REWARD, in the most general and extensive sense ever given to the word, may be defined to be — a portion of the matter of good,* which, in consideration of some service supposed or expected to be done, is bestowed on some one, in the intent that he may be benefited thereby.†

When employed under the direction of the principle of utility, it operates as a motive

* *A portion of the matter of good*, and not a portion of good itself. The cause must be distinguished from the effect; — the means of obtaining pleasures or exemptions from pains, from the pleasures or exemptions from the pains themselves. It is the former alone which the legislator has to bestow.

† Or, since Reward, in a certain sense, is

for the performance of actions useful to society, in the same manner as, under the same guidance, punishment operates in the prevention of actions to which we ascribe an injurious tendency.

The services, in the production of which this precious matter may be employed, may be distinguished into *ordinary* and *extraordinary*.

Ordinary services may be subdivided into regularly recurring or routine, and occasional. By *routine services*, I mean those which, in all the various departments of government, the public functionaries are bound to perform in virtue of their respective offices.

By *occasional services*, I mean those required by the government at the hands of persons not in its employ. They belong almost entirely to the administration of justice, and that branch of the police which is connected with it — as denouncing and prosecuting criminals, giving judicial evidence, and seizing persons accused, &c. To the same head may be referred services rendered to individuals in case of fires, inundations, and shipwrecks: inasmuch as the government is interested in the preservation of every individual in the community, these services may be considered as rendered to it.

To the head of *extraordinary services*, may be referred — 1. Services rendered to the whole community by new inventions, giving to the operations of government, in any of its different branches, an increased degree of perfection: such as important improvements in military or naval tactics, fortification or shipbuilding, &c.; in the mode of administering justice, regulating the police, or the finances, or in any other part of the field of legislation.

2. Services rendered in time of war, by the seizure or destruction of objects contributing to the power of the enemy, or by the preservation of such as belong to one's own country.

3. Services rendered by persons exercising the office of foreign ministers, consisting in the prevention or termination of the calamities of war, or in the bringing about useful alliances.

4. Discoveries of great importance to the augmentation of the national wealth; new methods of abridging labour; the introduction of new branches of industry, &c.

5. Discoveries in science, which are not susceptible of immediate application to the arts.

6. Noble actions, and distinguished instances of virtue: in considering which, not only the immediate benefit should be regarded, but their influence as examples upon the cultivation of similar excellencies.

Such is the field of services: such, therefore, is the field of reward.

With regard to rewards, the most important division is into *occasional* and *permanent*. The first are applied, according to times and circumstances, to a single individual, or to a number of individuals, in virtue of some insulated and specific service. The others are charged upon some general fund provided for an indefinite number of persons, and for a succession of services.

In consequence of the extent and permanence of their effects, it is principally with regard to the latter class of rewards that it will be found of importance to establish the true principles which ought to regulate their distribution. Occasional rewards being confined within narrower limits, and their effects more transitory, erroneous views respecting them are comparatively of trifling consequence.

The most extensive use of the matter of reward takes place in transactions between individuals. In the case of personal services which are performed in virtue of a contract, the pay given to him by whom they are rendered, is his reward. In buying and selling, the reciprocal delivery is the reward for the mutual transfer. But the public, that is to say, the government on account of the public, has a demand for a variety of services and goods exactly similar to those of which an individual stands in need: and it is thus that the most advantageous mode of employing the matter of reward, even in the ordinary course of business, enters into the sphere of politics, and claims the attention of the legislator.

CHAPTER II.

MATTER OF REWARD — SOURCES.

BETWEEN the four objects — delinquency, punishment, expenditure, and reward, there is an intimate connexion. He who knows thoroughly the nature and possible modifications of any one, knows thoroughly the nature and possible modifications of all the rest. Why so? Because they are all of them but so many modifications of good and evil — of the instruments or causes of pain and pleasure, considered in a particular point of view. Whatever mischief being produced contrary to the will of the legislator, takes the name of an offence, the same when produced in pursuance of that will (so it be with a direct intention on his part that the party shall be a sufferer by it) takes the name

among the number of those names of fictitious entities which cannot be expounded but by paraphrasis, it may be said, that — Reward is given to a man, when, in consideration of some service supposed or expected to be rendered by him, a service, which it is intended should be a service, is done to him.

of punishment. Reward is to good, what punishment is to evil: reward on one part supposes expenditure on the other: whatever is received by one party on the footing of reward, is expended by some other: — when a view, then, is given of the several possible modifications of offence, a view is at the same time given in reality, if not in name, of the several possible modifications of reward.

This may at first sight appear a paradox; but as the absence of good is comparatively an evil, so the absence of evil is comparatively a good: the notion, therefore, of evil, and of all sorts of evil, is included in the notion of reward.

The several modifications of the matter of reward may be comprised under four heads: — 1. The matter of wealth; 2. Honour; 3. Power; 4. Exemptions. In respect of the employment of the direct mode for affording pleasure, it belongs not properly to political,* but to domestic government or education.

1. *The matter of wealth.—Money*, or *money's worth*, is by much the most common stuff of which rewards are made; and in general the most suitable of which they can be made: why it is so will appear hereafter.

2. *Honour.* — Honour may be made out of any stuff. In some cases, it is produced by the bearing a particular title not hereditary, —as the name of the office a man holds. In other cases, it is hereditary, and places the individuals bearing it in a distinct rank, superior to that of the other classes, —as in the case of the nobility. In other cases, it is unaccompanied with any distinguishing denomination, or any particular title, — as in the case of medals, or public thanks conferred after any great victory, in the name of the king and parliament.

A graduated scale of ranks, especially when its gradations are determined by merit, and depend upon actual service, is an excellent institution. It creates a new source of happiness, by means of a tax upon honour, almost imperceptible to those by whom it is paid: it augments the sum of human enjoyment; it increases the power of government, by clothing its authority with benignity; it opens new sources for the exercise of hope, the most precious of all possessions; and it nourishes emulation, the most powerful of all incentives to virtuous actions.

Such a graduated scale of ranks has at all times been in use in the military branch of the public service. But in this case, the principal object is not honour, but power: — superiority in rank is invariably accompanied by superiority in command. The honour which accompanies the power is but an accidental appendage.

Catherine II. extended the application of this arrangement to the civil service. She distributed all the public officers in the civil department into distinct and even numerical classes, corresponding with the distribution of rank in the army: — secretaries, judges, physicians, academicians, all the civil functionaries, being advanced by steps, a perpetual state of emulation and of hope stimulated their labours throughout the whole course of their career. It was an invention in politics, which matches the most ingenious discovery in art that the present century has witnessed. At one stroke, without violence or injustice, hereditary nobility was deprived of the greater part of its injurious prerogatives. The foremost in rank and wealth began his career at the lowest step: his ascent through each gradation depending upon the appointment of the sovereign, if without merit, he was left behind, while men of the most obscure birth took precedence of him. This engine was the more powerful, from the gentleness with which it operated — the simple non-collation of reward performing the office of punishment.

Another advantage gained by the transference of the denominations of the military ranks into the civil service is, that the respect borne by the military to the civil functionaries is thus in no small degree increased. It is an ingenious artifice for conquering the barbarous and absurd contempt for civil functions which prevails in all military governments. The assimilation of ranks naturally leads to the assimilation of respect. From the time that this arrangement was made, the nobility were seen eagerly to engage in offices, which before they had regarded with disdain.

Orders of knighthood appear like floating fragments detached from some such regular system of honorary rewards.

In some states, an order of knighthood has been established under the title of "*The Order of Merit.*" It might be supposed that this order had been established as a jest, by way of satire upon all other orders. Not so, however: whatever ridicule there may be, falls exclusively upon those who are members of this order: of all orders it is the least distinguished; the nobility are not candidates for admission — they consider it derogatory to their *birth*. It is the reward of — it may be purchased by, *service*.

The higher ranks of knighthood, are they to be considered as rewards? — are they public rewards? To this question it appears difficult to give a decisive answer They are

* Whether wisely or not, it is, however, in some countries employed by the government itself. Under the consulate government of France, fêtes were given at the expense of the government in each year, on what were called *les jours complimentaires*. The principal part of expense of the opera at Paris, is said now to be defrayed by the government.

bestowed for so great a variety of reasons, that to give any description of them, which shall be applicable to all cases, is impossible. They are sometimes given for the performance of distinguished services; but much more generally to courtiers and men of rank, who are the companions of the sovereign, to increase the splendour of his court. In these cases, the merit proved is, that the individual has made himself agreeable to the sovereign. But if persons thus decorated claim distinctions not belonging to other members of the community, — if every one must yield them precedence, ought not some public reason to be given for creating this superiority — for this comparative degradation of the largest portion of the community? Ought such drafts upon the respect of the public to be drawn in favour of an individual, till it has been shown that he has rendered services to entitle him to this special homage? When thus conferred, is not a resource that might yield important fruits employed with bad economy? We shall return to this subject.

3. *Power.*—The principles which ought to regulate the distribution of this great object of human desire, belong to the head of constitutional law, rather than to our present subject. Power is created for a purpose altogether different from that of serving as matter of reward. Merit is not the only consideration by which its distribution must be governed.

Under a monarchical government, for example, the inconveniencies attending the election of a king may be so serious, that the supreme power ought to be attached to some qualification more manifest and indispensable than the personal merit of an individual. In a mixed government, also, in which there is a chief magistrate, and a body of hereditary nobles invested with certain powers, it may be thought proper that this body should be composed of many members: but the more numerous, the less susceptible is it of that sort of selection which supposes in each individual distinguished merit.

Thus far, however, we may determine in general, viz. that power, wherever it can be employed without inconvenience as matter of reward, ought to be so employed.

In thus using it, the difficulty is to select any act or event that shall serve as evidence of the capacity of individuals for exercising the power with which they may come to be invested. In public employments, for example, how various are the talents required, for the possession of which no single act can be considered as satisfactory evidence! Were this not the case, the greater number of public employments might be conferred as rewards for the performance of some determinate service, respectively relating to them.

In the Gazette, notices might be given, couched in the following terms: — "Whoever produces the most perfect die, shall be placed at the head of the Mint." — "Whoever produces a model of the most serviceable piece of artillery, shall be placed at the head of the Ordnance." — "He who constructs the swiftest sailing vessel, united with the most perfect means of attack and defence, shall be placed at the head of the naval architecture." — "The author who writes the best treatise upon commerce, finances, or the art of war, shall be placed at the head of the Board of Trade, shall be first Lord of the Treasury, or Commander-in-Chief, respectively. He who writes the best treatise on the laws, shall be made Chancellor."

At first view, nothing can be more captivating than such a plan; but upon the slightest examination, it will be found more specious than solid. Why? Because it is by no means uncommon for a man who is in an eminent degree endowed with one of the qualities requisite, to be altogether destitute of others equally indispensable.

There are, besides, cases in which even this imperfect mode of proof is altogether wanting. During a long period of tranquillity, by what describable service can a military man display his talents for command? Among the qualities most essential for such a duty, are presence of mind, enlarged views, foresight, activity, courage, perseverance, personal influence, &c. &c. By what specific act can an officer who has seen no service, show himself to be possessed of any of these qualifications? We are reduced, then, to mere conjecture. The best founded opinions are drawn from his habits of life, his attachment to his profession, and above all, the confidence reposed in him by those who are engaged in the same profession, whose opinion is founded upon a multiplicity of acts, which in the aggregate constitute his character.

Discernment, or the art of judging of individual capacity, is a rare quality, whose use it is impossible to supersede by general rules.

A slight advance might perhaps be made in this difficult art, did we possess a catalogue of *the indications of talents or capacity*, as applicable to the various departments of state.*

* For the illustration of the ideas of the author upon this subject, I had prepared a note, in which I had collected together various instances of the prompt display of that subtle and penetrating talent which detects the possession of qualities undiscernible to ordinary eyes. To avoid, however, engaging in too long a discussion, I shall confine myself to a single instance. A person well acquainted with anecdotes relating to the Russian court, gave me, while I was at Petersburgh, the following account of the origin of the success of the High Chancellor Besborodko: — Being still in a subordinate office belonging to the Chancery, one day, when he had presented

4. *Exemptions.*—The legislator creates two sorts of evils: he appoints punishment for offences; he imposes burthensome duties upon the various members of the community. Hence exemptions may be of two kinds: exemptions from punishment already incurred; exemptions from civil burthens.

An exemption from punishment already incurred, is a pardon. Pardons have often been given in the way of reward, that is, in consideration of former services. Such acts cannot be foreseen and provided for by anticipation: they are the result of the discretion entrusted in this behalf to the sovereign.

Under the English law, however, there are instances in which, by anticipation, exemption from punishment is granted; that is to say, before the punishment is inflicted. Thus, from the policy or weakness of the temporal sovereign, the English clergy obtained in times of barbarism an exemption in all cases from capital and several other kinds of punishment: an exemption which being by statute law confined, in regard to causes on the one hand, while by common law it was extended, with regard to persons on the other, has left this part of the penal branch of the law in the confusion under which it still labours.* †

The nobility followed the example of the clergy. In almost every country of Europe they have found themselves invested with exemptions of this nature. Ancient Rome set the example. No citizen could be put to death: Verres, convicted of the most atrocious crimes, atoned for them by enjoying at a distance from Rome the fruits of his plunder.

When Catherine II., empress of Russia, convened together deputies from all the provinces of that immense empire, under the pretence of their assisting in the formation of a code of laws (a sort of parody of the legislative assemblies of free states, which was not however without its use, in so far as it contributed to the spread of enlightened ideas,) she conferred upon them, amongst other privileges, an exemption from all corporal punishment, cases of high treason excepted. This species of distinction, which as a reward for legislators, could scarcely be imagined in any other state than one just emerging from a state of barbarism, had doubtless for its object the increasing their self importance, and the conferring upon them a sort of rank which should last beyond the duration of their duty.

As a man may be punished in his person, his reputation, his property, — in like manner, through necessity, and not with the view of punishing him, he may be burthened. An exemption from a burthen is an exemption from the obligation of rendering service: services are either services of submission, in the rendering of which the will of the party has no share — or services of behaviour.

Of exemption from services of submission, not exacted in the way of punishment, we shall not find a great variety of examples. In Great Britain, members of the upper house of Parliament and other peers constantly, and members of the lower house at certain periods, are exempted from arrests: this privilege they may be considered as enjoying partly on the ground of satisfaction, partly that they may not be diverted from the exercise of their functions, and partly because, being members of the sovereign body, they would have it so.

Among services performed by action, are some which may be styled services of respect. It is a service of respect exacted by usage in every kingdom in Europe not to wear a hat, or what is equivalent, in the presence of the king. In Spain, some families among the nobility enjoy the privilege of remaining covered in the presence of the king. In Ireland, the head of one family (the family of the De Courcys, earls of Kinsale) enjoys the like exemption, as a reward for some service rendered by an ancestor.

By a British statute, he who apprehends and prosecutes to conviction a criminal of a certain description, received amongst other rewards an exemption from parish offices, together with the privilege of transferring that exemption to another.

By other British statutes, persons who have borne arms for a certain length of time in the service of the state, were exempted from the obligation of those laws which, lest industry should be too common, forbade a man from working for his own benefit at a trade at which he had not worked seven years for the benefit of another.

There are various other exemptions of the same nature: but as the object here is not to give an exhaustive view of these several exemptions, but merely a few instances to serve

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various ukases to the Empress (Catherine II.) he perceived that he had forgotten to compose one that he had been particularly commanded to prepare. His first alarm being over, he determined how to act, and pretended to read the ukase in question, though he held in his hand only a sheet of blank paper. The Empress was so well satisfied with the performance, that she desired to sign it immediately. The disconcerted clerk was compelled to acknowledge his neglect. The Empress, less offended with the imposition than struck by the presence of mind which it displayed, forthwith placed him at the head of the department, in which before he had held only a subordinate situation. — *Dumont.*

* In Poland, the poor gentlemen serve as domestics to the wealthy nobility: they perform without scruple all the menial offices that are reckoned by us as most degrading. There was only one thing about which they were solicitous, and which distinguished them from the class of slaves: it was that they should not be beaten except when stretched upon a mattress.

† Benefit of Clergy was abolished by 7 & 8 Geo. IV. c. 28, § 6. — *Ed.*

by way of example, the above specimens may suffice.

One general observation applies to all cases of exemptions from general obligations imposed by law: it is — that the more severe the laws, the more abundant, as drawn from this source, is the fund of reward. It may be created by a mere act of restitution, by the rendering of justice: to some may be given what ought to be left for all: conditions may be annexed to what ought to be given gratuitously. The greater the mass of injustice inflicted, the greater the opportunity for generosity in detail. The oppressive government of one sovereign is a mine of gold to his successor. In the church, it is the good works of their predecessors — in the state, it is their bad works, that increase the treasure of their successors. In Russia and in Poland, emancipation is a very distinguished reward. A tyrant may reward by doing less mischief.

One word on the last article of reward — *Pleasures*. Punishment may be applied in all shapes to all persons. Pleasure, however, in the hands of the legislator, is not equally manageable: pleasure can be given only by giving the means by which it is purchased — that is to say, the matter of wealth — which every one may employ in his own way.

Among certain barbarous or half-civilized nations, the services of their warriors have been rewarded by the favours of women. Helvetius appears to smile with approbation at this mode of exciting bravery. It was perhaps Montesquieu that led him into this error. In speaking of the Samnites, among whom the young man declared the most worthy selected whomsoever he pleased for his wife, he adds, that this custom was calculated to produce most beneficial effects. Philosophers distinguished for their humanity — both of them good husbands and good fathers, both of them eloquent against slavery, how could they speak in praise of a law which supposes the slavery of the best half of the human species? — how could they have forgotten that favours not preceded by an uncontrouled choice, and which the heart perhaps repelled with disgust, afforded the spectacle rather of the degradation of woman than the rewarding a hero? The warrior, surrounded by palms of honour, could he descend to act the part of a ravisher? And if he disdained this barbarous right, was not his generosity a satire on the law?*

Voltaire relates with great simplicity, that at the first representation of one of his tragedies, the audience, who saw the author in a box with an extremely beautiful young duchess, required that she should give him a kiss, by way of acknowledging the public gratitude. The victim, a partaker in the general enthusiasm, felt apparently no repugnance to make the sacrifice: and, without the intervention of the magistrate, we may trust to the enthusiasm of the sex, and their passion for distinction, for preferences that may animate courage and genius in their career.

* In the Koran, Mahomet permits to his followers to add to the number of their concubines, which otherwise is limited, the captives whom they can take in battle. It was not thus the Scipios and Bayards made use of their victories. Such is the difference between barbarism and civilization.

CHAPTER III.

OF REWARD AND PUNISHMENT COMBINED.

THERE are some cases in which it would be improper to employ either reward or punishment alone. They are those in which the two forces may with advantage be united — in which the legislator says to the citizen, Obey, and you shall receive a certain reward; disobey, and you shall suffer a certain punishment.

The two modes may be properly united when the service required by the law depends for its performance upon a small number of persons, in virtue of the peculiar circumstances in which they happened to be placed. If, for example, the object be the securing a delinquent at the moment that he is about to commit an offence, to inform against him or to prosecute him — it will be found expedient, in order to ensure the rendering of such services, to combine with a reward for their performance, a punishment for their omission.

In such cases, punishment is useful in two ways: beside the effect produced by its own force, it also sustains the value of the reward. There is a very strong prejudice in the public mind against persons who accept pecuniary reward for the performance of such services; but when a penal motive is added, the public resentment is abated, if not altogether removed. The prosecution of a criminal for the sake of the pecuniary benefit derivable from it, is generally regarded as discreditable; but he who undertakes the prosecution to avoid being himself punished, will be considered at least as excusable. The desire of self-preservation is called a natural propensity; that is to say, is regarded with approbation. The desire of gain is a propensity not less natural; but in this case, although more useful, it is not regarded with the same approbation. This is a mischievous prejudice: but it exists, and it is therefore necessary to combat its influence. We must treat opinions as we find them, and not act as though they were what they ought to be. This is not the only instance in which it is necessary to put a constraint upon men's

inclinations, that they may be at liberty to follow them.

An instance of the judicious mixture of reward and punishment is furnished by the practice pursued in many schools, called *challenging*. All the scholars in the same class having ranged themselves around the master, he who stands at the head of the class begins the exercise: does he make a mistake, the next to him in succession corrects him and takes his place; does the second not perceive the mistake, or is he unable to correct it, the privilege devolves upon the third; and so of the rest; — the possession of the first place entitling the holder to certain flattering marks of distinction.

The two incitements are in this case most carefully combined: punishment for the mistake, loss of rank; reward for the informer, acquisition of that same rank; punishment for not informing, loss of rank the same as for the offence itself.

If, under the ordinary discipline of schools, in the case where the scholar has no natural interest which should induce him to point out the mistakes of his associate, it were attempted to produce these challenges by the force of reward alone, the opinion which the general interest would create would oppose an obstacle to the reception of the reward, most difficult to be overcome: but when the young competitors have to say in their defence, that they have depressed their neighbour merely to avoid being depressed themselves, they are relieved from all pretence for reproach; every one without hesitation abandons himself to the suggestions of his ambition, and, under the sanction of the law, honour combats with unrestrained impetuosity.

This ingenious expedient for exciting emulation is one among the other advantages of a numerous class. In the private plan of education, there are seldom actors in sufficient number for the performance of this comedy.

The most favourable opportunities for legislation are those in which the two methods are so combined, that the punishment immediately follows the omission of the duty, and the reward its performance.

This arrangement presents the idea of absolute perfection. Why? Because to all the force of the punishment is united all the attractiveness and certainty of the reward.

I have said *certainty:* but this requires to be explained. Denounce a punishment for such or such acts: the only individual who cannot fail to know whether or not he has incurred the punishment, is interested in concealing his having incurred it. On the other hand, offer a reward, and the same individual finds himself interested in producing the necessary proofs for establishing his title to it. Thus a variety of causes contribute to the failure of punishment — the artifices of the person interested, the prejudices against informers, the loss or failure of evidence, the fallibility or mistaken humanity of judges — while to the attainment of reward no such obstacles occur: it operates, then, upon all occasions, with the whole of its force and certainty.

Before a celebrated law, which we owe to Mr. Burke, the lords of the treasury were charged, as they still are, with the payment of the salaries of certain of the public servants. Justice required that all should be paid in the same proportion as funds for that purpose were received. But no law was as yet in force to support this principle. As might naturally be expected, all sorts of preferences had place: they paid their friends first, and it cannot be supposed they forgot themselves. When the funds set apart to this service were insufficient, the less favoured class suffered. The delays of payment occasioned continual complaints. How would an ordinary legislator have acted? He would have enacted that every one should be paid in proportion to the receipts; and that his regulations might not be wanting in form, he would have added a direct punishment for its breach, without inquiring if it were easy to be eluded or not. Mr. Burke acted differently: he arranged the different officers in classes; he prepared a table of preference, in which the order is the inverse of the credit which they might be supposed to possess. The noble lords, with the prime minister at their head, bring up the rear, and are prohibited from touching a single shilling of their pay, till the lowest scullion has received every penny of his.

Had he permitted these great officers to pay themselves, and prescribed his table of preference for the rest, under the penalty of losing a part of their salaries, what embarrassment, what difficulties, what delays! — Who would undertake the odious task of informer? How many pretences of justification would they not have had? Who would have dared to attack the ministers? In this arrangement of Mr. Burke, till they have fulfilled their duty, they lose the enjoyment of all their salary; they lose it without inquiry and without embarrassment. Thus rendered conditional, their salary becomes in reality the recompence of their regularity in paying the others.

The advantages of this invention may be thus summed up. Their salary, depending upon the performance of the service, is no longer a barren gratification, but a really productive reward. The motive has all the *force* belonging to punishment: by the suspension of payment, it operates as a fine. It possesses all the *certainty* of a reward: the right to receive follows the completion of the service, without any judicial procedure.

CHAPTER IV.

OF THE UNION OF INTEREST WITH DUTY, AND OF SELF-EXECUTING LAWS.

WHAT has been said in the preceding chapter will serve to elucidate the meaning of the above two expressions, which, though in familiar use with political writers, have never yet been completely explained.

The legislator should, say they, endeavour to unite interest with duty: this accomplished, they consider perfection as attained. But how is this union to be brought about?—what constitutes it? To create a duty and affix a punishment to the violation of it, is to unite a man's interest with his duty, and even to unite it more strongly than by any prospect of reward. But this is not universally at least what they mean; for if punishment alone were sufficient for the establishment of the desired connexion between interest and duty, what legislator is there who would fail in its accomplishment? — what would there be to boast of in a contrivance which surpasses not the ingenuity of the most clumsy politician?

In this phrase, by the word *interest*, *pleasure* or *profit* is understood: the idea designed to be expressed is, the existence of such a provision in the law, as that conformity to it shall be productive of certain benefits which will cease of themselves so soon as the law ceases to be observed.

In a word, the union in question is produced whenever such a species of interest can be formed as shall combine the *force* which is peculiar to punishment with the *certainty* which is peculiar to reward.

This connexion between duty and interest is to a high degree attained in the case of pensions and places held during pleasure. Let us suppose, for example, that the continuance of the pension is made to depend upon the holder's paying at all times absolute obedience to the will of his superior. The pensioner ceases to give satisfaction; the pension ceases. There are none of the embarrassments and uncertainties attendant on ordinary procedure; there are no complaints of disobedience made against persons thus circumstanced. It is against the extreme efficacy of this plan, rather than against its weakness, that complaints are heard.

In some countries, by the revenue laws, and particularly in the case of the custom-house duties, it is not uncommon to allow the officers, as a reward, a portion of the goods seized by them in the act of being smuggled. This is the only mode that has appeared effectually to combat the temptations to which they are perpetually exposed. The price which it would be worth while for individuals to offer to the officers for connivance, can scarcely equal, upon an average the advantage they derive from the performance of their duty. So far from there being any apprehension ofth eir being remiss in its discharge, when every instance of neglect is followed by immediate punishment, the danger is, lest they should be led to exceed their duty, and the innocent should be exposed to suspicion and vexation.

The legislator should enact *laws which will execute themselves*. What is to be understood by this? Speaking with precision, no law can execute itself. In a state of insulation, a law is inoperative: to produce its desired effects, it must be supported and enforced by some other law, which, in its turn, requires for its support the assistance of other laws. It is thus that a body of laws forms a group, or rather a circle, in which each is reciprocally supported and supports. When it is said, therefore, that the law executes itself, it is not meant that it can subsist without the assistance of other laws, but that its provisions are so arranged that punishment immediately follows its violation, unaided by any form of procedure; that to one offence, another more easily susceptible of proof, or more severely punished, is substituted.

Mr. Burke's law, which has already been mentioned, is justly entitled to be ranked under this head. The clause which forbids the ministers and treasurers to pay themselves till all other persons have been paid, possesses in effect the properties of a punishment annexed to any retardation of payments — a punishment which commences with the offence, which lasts as long as the offence, which is inflicted without need of procedure; in a word, a punishment, the imposition of which does not require the intervention of any third person.

Before the passing of this law, large arrears on the civil list were allowed to accumulate: their accumulation bore the character merely of a simple act of omission, which could not be classed under any particular head of offence, and the evil of which might moreover be palliated by a thousand pretexts. After the passing of this law, the ministers, it is true, might still, in spite of the law, continue to give to themselves a preference over the other creditors on the civil list — there is no physical force other than existed before to prevent them: but in virtue of this law, any such preference would be a palpable offence—a species of peculation which would be strongly reprobated by public opinion.

Another example is furnished by the laws respecting the payment of stamp-duties. — These laws are represented as among the number of those which execute themselves, and are panegyrized accordingly. This is true with regard to so much of these taxes as is levied upon contracts and law-proceed-

ings. Let us explain their mechanism. The sanction given to private contracts, and the protection afforded by the law to person and property, are services which the public receives at the hands of the ministers of justice. The method in which these duties, then, are levied, is this: these services are at first refused to all persons without exception; they are then offered to all persons who, at the price set upon them, have the means and inclination to become purchasers. Thus a protection, which might be considered as a debt due from the state to all its subjects, is converted into a reward, by means of the precedent condition annexed to it. This is not the time for examining whether this duty, which palpably amounts to the selling of justice, is a judicious tax: all that is here necessary to be observed is, that the payment is insured by the security it affords, and the danger with which the omission is accompanied.

To range over the whole field of legislation, in order to ascertain the different cases in which this species of political mechanism has been employed, or in which it might be introduced with advantage, does not belong to our present subject: — general directions might easily be framed for the construction of self-executing laws, and their application might occupy a place in "*The recreations of legislation.*"

CHAPTER V.

MATTER OF REWARD — REASONS FOR HUSBANDING.

IF it be proper to be frugal in the distribution of punishment, it is no less proper to be so in the distribution of reward. Evil is inflicted in both cases. The difference is, that punishment is an evil to him *to whom* it is applied — reward, to him *at whose expense* it is applied. The matter of reward, and the matter of punishment, spring from the same root. Is money bestowed as a reward? Such money can only arise from taxes, or original revenue — can only be bestowed at the public expense: — truths so obvious, that proof is unnecessary; but which ought on all occasions to be recollected, since, all other circumstances being equal, to pay a tax to a given amount is a greater evil than to receive it is a good.

Rewards, consisting in honour, it is commonly said, cost nothing. This is, however, a mistake. Honours not only enhance the price of services; (as we shall presently see,) they also occasion expenses and burthens which cannot be estimated in money. There is no honour without pre-eminence: if, then, of two persons, for example, who are equal, one profits by being made the higher, the other suffers in at least equal proportion by being made the lower of the two. With regard to honours which confer rank and privileges, there are commonly two sets of persons at whose expense honour is conferred: the persons from amongst whom the new dignitary is taken, and the persons, if any, to whom he is aggregated *by his* elevation. Thus the greater the addition made to the number of peers, the more their importance is diminished — the greater is the defalcation made from the value of their rank.

The case is similar with regard to *power*. It is by taking away *liberty* or *security*, that *power* is conferred; and the share of each man is the less, the greater the number of co-partners in it. The power conferred in any case must be either new or old: if new, it is conferred at the expense of those who are subject to it; if old, at the expense of those by whom it was formerly exercised.

Exemptions given in the way of reward may appear at first sight but little expensive. This may be one reason why they have been so liberally granted by short-sighted sovereigns. It ought however to be recollected, that in the case of public burthens, the exemption of one increases the burthen on the remainder: if it be honourable to be exempted from them, it becomes a disgrace to bear them, and such partial exemptions at length give birth to general discontent.

The exemptions from arrest for debt, enjoyed by members of parliament, are a reward conferred at the expense of their creditors. Exemptions from parish offices and military services are rewards conferred at the expense of those who are exposed to the chance of bearing them. The burthen of exemptions from taxes falls upon those who contribute to the exigencies of the state.

A privilege to carry on, in concurrence with a limited number of other persons, a particular branch of trade, is an exemption from the exclusion which persons in general are laid under with reference to that trade: the favour is shown at the expense of the persons who are sharers in the privilege.

If there be an instance in which any modification of the matter of reward can be conferred without expense, it will be found among those which consist in exemption from punishment. When an exemption of this sort is conferred, the expense of it, if there be any, is borne by those who are interested in the infliction of the punishment; that is, by those in whose favour the law was made, which the punishment was intended to enforce. But if, by the impunity given, the sanction of the laws be weakened, and crimes consequently multiplied, the pardon granted to criminals is dearly paid for by their victims.

The evil of prodigality is not confined to the diminishing the fund of reward: it operates as a law against real merit. If rewards

are bestowed upon pretended services, such pretended services enter into competition with real services. He succeeds best, who aims, not to entitle himself to the gratitude of the people, but to captivate the goodwill of him at whose disposal the fund of reward is placed. Obsequiousness and courtly vices triumph over virtue and genius. The art of pleasing is elevated at the expense of the art of serving.

What is the consequence? Real services are not performed, or they are purchased at extravagant prices. It is not sufficient that the price paid for them be equal to that of the false services: beyond this, there must be a surplus to compensate the labour which real services require. "If so much is given to one who has done nothing, how much more is due to me, who have borne the heat and the burthen of the day? — if parasites are thus rewarded, how much more is due to my talents and industry?" Such is the language which will naturally be employed, and not without reason, by the man of conscious merit.

It is thus that the amount of the evil is perpetually accumulating. The greater the amount already lavished, the greater the demand for still further prodigality; as in the case of punishment, the more profusely it has been dealt out, the greater oftentimes is the need of employing still more.

When by the display of extraordinary zeal and distinguished talents, a public functionary has rendered great services to his country, —to associate him with the crowd of ordinary subordinates, is to degrade him. He will feel in respect of the fund of reward, in the same manner as the disposer of it ought to have felt. He will consider himself injured, not only when anything is refused to him, but when anything is bestowed upon those who have not deserved it.

A profuse distribution of honours is attended with a double inconvenience: in the first place it deteriorates the stock; and in the next, it is productive of great pecuniary expense. When a peerage, for example, is conferred, it is generally necessary to add to it a pension, under the notion of enabling the bearer to sustain its dignity.

It is thus that the existence of an hereditary nobility tends to increase the price necessary to be paid in the shape of reward. Has a plebeian rendered such services to his country as cannot be passed by with neglect, the first operation is to distinguish him from men of his own rank, by placing him among the nobility. But without fortune, a peerage is a burthen; to make it worth having, it must be accompanied with pecuniary reward: the immediate payment of a large sum would be too burthensome; posterity is therefore made to bear a portion of the burthen.

It is true, posterity ought to pay its share in the price of services of which it reaps a share of the advantage. But the same benefit might be procured at a less expense: if there were no hereditary nobility, personal nobility would answer every purpose. Among the Greeks, a branch from a pine tree, a handful of parsley, — among the Romans, a few laurel leaves, or ears of corn, — were the rewards of heroes.

Fortunate Americans! fortunate on so many accounts, if to possess happiness, it were sufficient to possess everything by which it is constituted, this advantage is still yours! — Preserve it for ever: bestow rewards, erect statues, confer even titles, so that they be personal alone; but never bind the crown of merit upon the brow of sloth.

Such is the language of those passionate admirers of merit who would gladly see a generous emulation burning in all ranks of the community — who consider everything wasted which is not employed in its promotion. Can anything be replied to them? If there can, it can only be by those who, jealous of the public tranquillity as necessary to the enjoyments of luxury, and more alarmed at the folly which knows no restraint than at the selfishness which may be constrained to regulate itself, would have, at any price, a class of persons who may impose tranquillity upon those who can never be taught.

In some states, the strictest frugality is observed in the distribution of rewards: such in general has been the case under republican governments; though it is true, that even in democracies, history furnishes instances of the most extravagant prodigality and corruption. The species of reward bestowed by the people upon their favourites with the least examination, is power — a gift more precious and dangerous than titles of honour or pecuniary rewards. The maxim, *Woe to the grateful nation!* is altogether devoid of meaning, unless it be designed as a warning against this disposition of the people to confer unlimited authority upon those who for a moment obtain their confidence.

After having said thus much in favour of economy, it must not be denied that specious pretences may be urged in justification of a liberal use of rewards.

That portion of the matter of reward which is superfluously employed, it is said, may be considered as the fund of a species of lottery. At a comparatively small expense, a large mass of expectation is created, and prizes are offered which every man may flatter himself with the hope of obtaining. And what are all the other sources of enjoyment, when put in competition with hope? But can such reasons justify the imposition or continuance of taxes with no other view than that of increasing the amount of the

disposable fund of reward? Certainly not. It would be absurd thus to create a real evil —thus to pillage the multitude of what they have earned by the sweat of their brow, to multiply the enjoyments of the wealthy. In a word, whatever may be thought of this lottery, we must not forget that its prizes must be drawn before we can obtain any useful services. To the individual himself, active is more conducive to his happiness than idle hope: the one developes his talents, the other renders them obtuse; the first is naturally allied to virtue, the second to vice.

In England, reasons, or at least pretexts, have been found for the arbitrary disposal of rewards, which would not exist under an absolute monarchy. The constitution of parliament gives occasion to the performance of services of such a nature as cannot be acknowledged, but which in the eyes of many politicians are not the less necessary. A certain quantity of talent is requisite, it is said, to save the political vessel from being upset by any momentary turbulence or whim of the people. We must possess a set of Mediators interested in maintaining harmony between the heterogeneous particles of our mixed constitution; a species of Drill Serjeants is required for the maintenance of discipline among the undulating and tumultuous multitude. There must be a set of noisy Orators provided for those who are more easily captivated by strength of lungs than by strength of argument; Declaimers for those who are controuled by sentimentalism; and imaginative, facetious, or satirical Orators, for those whose object it is to be amused; Reasoners for the small number, who yield only to reason; artful and enterprising men to scour the country to obtain and calculate the number of votes: there must also be a class of men in good repute at court, who may maintain a good understanding between the head and the members. And all this, they say, must be paid for—whether correctly or not, does not belong to our present discussion.

It may be further said, that the matter of reward, besides being used for reward, may be used as a means of power, — and that in a mixed constitution like ours, it is necessary to maintain a balance among its powers. Certain creations of peers therefore, for example, which could not be justified, if considered as rewards, may be justified as distributions of power. There is at least something in this which deserves examination; but its examination here would be out of place.

Want of economy in the distribution of rewards may also be attempted to be justified, by comparing the sum so expended with the expense incurred in the carrying on of a war. I advise every one who has projects upon the public money, to employ this argument in preference to every other: when one calculates the immense sum expended during a single campaign, either by land or sea; when we reflect on the millions that vanish in sound and smoke, all other profusion sinks into insignificance. When we behold the treasures of a nation flowing away in such rapid torrents, can any great indignation be felt against those who, by art, or obsequiousness, or court favour, detach from the mass a single drop or a small stream for their own benefit? If the people so readily lend themselves to the gratification of political passions —if they part so freely with their gold and their blood, for the momentary gratification of their vengeance or their passion for glory, — can it be expected that they will murmur at the pomp they covet, and the few insignificant favours which their prince bestows? Will they be supposed so mean as to be niggard with pence and lavish with millions?

This mode of comparison is not new to courts: it ought to have been familiar to Louis XIV. if it be true, as there is reason for believing, that the building of Versailles cost two thousand millions of livres. In respect of expense, this was more than equal to a war: but at least it was expended without bloodshed, there was no interruption of trade; on the contrary, it gave vigour to industry, and shed lustre over the arts. What a fortunate source of comparison to the advocates of absolute monarchy!

There is yet another mode of estimating the justness of any public expenditure — another source of comparison somewhat less agreeable to the eyes of courtiers. Compare the amount of the proposed expenditure with an equal portion of the produce of the most vexatious and burthensome tax. In this country, for example, let the comparison be made with the produce of the tax on law proceedings, whose effect is the placing of the great majority of the people in a state of outlawry. The option lies between the abolition of this tax and the proposed employment of its produce. They thus become two rival services. It is a severe test for frivolous expenses, but it is strictly just. How disgraceful does wasteful luxury appear in the budget, when thus put in competition with the good whose place it occupies, or the evil of which it prevents the cure!

From these observations the practical conclusion is, that the matter of reward being all of it costly, none of it ought to be thrown away. This precious matter is like the dew: not a drop of it falls upon the earth which has not previously been drawn up from it. An upright sovereign therefore gives nothing. He buys or he sells. His benevolence consists in economy. Would you praise him for generosity? Praise also the guardian who lavishes among his servants the property of his pupils.

The most liberal among the Roman Emperors were the most worthless; for example, Caligula, Claudius, Nero, Otho, Vitellius, Commodus, Heliogabalus, and Caracalla: the best, as Augustus, Vespasian, Antoninus, Marcus Aurelius, and Pertinax, were frugal. (*Esprit des Loix*, liv. v. ch. xviii.)

A most important lesson to sovereigns: it warns them not to value themselves upon the virtue of generosity — in short, not to think that in their station generosity is a virtue. If not a strictly logical argument, it is, however, a popular and persuasive induction: — "Esteem not yourselves to be good princes for a quality in which you have been outstripped by the worst."

CHAPTER VI.

REMUNERATION EX POST FACTO.

IN the preceding chapter it was stated, that in accordance with the principle of utility, the costly matter of reward ought only to be employed in the production of service; and that, in accordance with that principle, a reward can only consist of a portion of the matter of reward, employed as a *motive* for the production of service. This would seem to exclude everything which can be called liberality — every act by which a reward may be bestowed upon any service to which it has not been promised beforehand.

Such may appear the consequence at first sight. A reward, it may be said, ought only to be bestowed upon the performance of the service to which it has been promised; since it is only where it has been foreseen, that it can have operated as a motive. Why then bestow it upon a service, how useful and important soever, to which it has not been promised? The service you would have been willing to purchase, at the expense of a certain reward, has been happily rendered without any engagement on your part to bear the expense. Why, therefore, should any reward be bestowed? why pretend to employ reward in the production of an effect which has been produced without it? Is not this a useless employment of reward? — is not this an expenditure in pure waste?

Certainly such an expense cannot be justified as a means of producing an effect, which has by the supposition already been produced; but it may be justified as serving to give birth to other effects of a like nature, as likely to cause future services to be rendered, which will agree with those that are past — at least in this, that they are services. A reward which thus follows the service may be styled an *ex post facto*, or unpromised reward. The *Society of Arts* has recognised and employed this distinction. A reward bestowed in fulfilment of a promise, upon the performance of a specified service, is called a *premium*. A reward bestowed without previous promise, is called a *bounty*.

To make it a rule never to grant a reward which has not been promised, is to tie up the hands of true liberality, and to renounce all chance of receiving any new kind of service. There is only one supposition which can justify this parsimony: it is, that every service has been foreseen and endowed beforehand. Whether legislation will ever attain this perfection, I pretend not to know. It has not attained it as yet; and till it be attained, sovereigns may reckon liberality amongst the number of their virtues.

Rewards which in this manner are the fruits of liberality, possess a great advantage over those which are awarded in virtue of a promise. These, confined to one object, operate only upon the individual service specified. The genial influence of the others extends over the whole theatre of meritorious actions. These are useful in determining researches to a particular point; the others present an invitation to extend them to everything which the human mind can grasp. These are like the water which the hand of a gardener directs to a particular flower; the others are like the dew which is distilled over the whole surface of the earth.

A promised reward, bestowed upon one who has not deserved it, is entirely lost. An unpromised reward, thus improperly bestowed, is not necessarily lost. The hand of liberality has been deceived, but the utility of the reward is not altogether thrown away, whilst opportunity is left for a better application of it in future. Had Alexander lavished upon the man who, to obtain his bounty, exhibited his skill in darting grains of millet through the eye of a needle, the rewards he bestowed upon Aristotle, it would have been a proof of prodigality and folly, whose effect would have been to multiply the race of mountebanks and jugglers. In rewarding Aristotle, he, without doubt, rewarded much jargon, of no greater value than this man's sleight of hand in darting millet; but since, in the midst of this jargon, a certain quantity of useful, and at that time new, truth was found, the rewards which this celebrated philosopher received may justly be placed to the account of useful liberality: their tendency was to multiply the precious race of instructors of mankind — the race of philosophers.

In fact, certain acts of liberality, which could not be justified, if considered as promised rewards, may deserve more or less indulgence, may possess a sort of utility of the same kind as that which belongs to rewards not promised. Even the act regarded as service may not strictly deserve to be connected with reward; but the disposition displayed by the distributing hand in awarding a recom-

pense, may give birth to the expectation of similar rewards for really meritorious service.

Rewards bestowed in pursuance of a promise, may be considered as conferred according to a law belonging to the class of *written laws;* whilst unpromised rewards, though not productive of similar evils, may be considered as establishing a kind of law, or rather tacit rule, analogous to that established by means of punishment, in what is called *unwritten law*. It would be fortunate, indeed, if the penal law might remain unwritten with as little inconvenience as remuneratory law. In the penal, and even the commonly called civil branches, these unwritten laws develope themselves by a train of hardships, not to say of injuries; whilst the worst which can happen in the remuneratory branch of unwritten law is this, that, by reason of its being unknown, it may become a tissue of useless bounty.

Catherine II. did not allow the remuneratory branch of her laws to be exposed even to this danger, from which there is so little to be feared. Had the hand of liberality been expanded — was the dew of reward poured out upon the head of merit — immediately inserted in the Gazette, the notification of the reward connected with the name of the individual, and the service which had deserved it, was resounded throughout the most distant and unfrequented parts of her vast empire. It would have been altogether glorious, had she hastened to give the same character of publicity and certainty to those other branches of unwritten law, in which it is required with so much greater urgency, and had she never conferred favours which she would have blushed to see gazetted.

In England, a noble example of reward, *ex post facto*, was exhibited in connexion with the first establishment of mail-coaches. The manager of a provincial theatre having proposed to the minister this plan for the better conveyance of letters, the plan was received, and having been tried in one part of the kingdom, it was afterwards extended to the whole: and this service being in consequence performed with a celerity and economy of which formerly there was no idea,*— as a reward, the inventor was appointed Comptroller-general of the Post-office, with a salary of £1500 per annum, besides a proportion of the savings. A reward thus judicious and equitable, transports us *to the year* 2440.† It is equivalent to a proclamation to this effect: — "Men of genius and industry, employ your talents for the service of your country; exert yourselves to the utmost; produce your plans; their reception shall depend alone upon the opinion formed of their utility; your country will not grudge the labour necessary for their examination. Good intentions shall not be treated with contempt; you shall not be nicknamed projectors by the idle and the incapable. Your plans shall not be disregarded because of their authors; they shall not be thrown aside because they are extraordinary, provided they be useful. Impartiality shall preside at their examination, and their utility shall be the measure of your reward."

There may appear at first sight a discrepancy between this and the immediately preceding chapter, but it is only in appearance. I say here, no less than heretofore, that the upright dispenser of public treasures gives nothing. He buys or he sells. With promised rewards he purchases bespoken, clearly defined, and limited services; with unpromised rewards he purchases services unbespoken, indeterminate, and infinite. The difficulty in both cases consists in making a proper choice of the action to be rewarded. This choice will form the subject of subsequent consideration.

CHAPTER VII.

PUNITION AND REMUNERATION — THEIR RELATIONS.

Wherefore, throughout the whole field of legislation, cannot reward be substituted for punishment? Is hope a less powerful incentive to action than fear? When a political pharmacopœia has the command of both ingredients, wherefore employ the bitter instead of the sweet?

To these natural but unreflecting inquiries, I reply by a maxim that at first view may appear paradoxical: — "Reward ought never to be employed, when the same effect can be produced by punishment." And, in support of this paradox, I employ another: — "Let the means be penal, and the desired effect may be attained without giving birth to suffering: let the means be remuneratory, and suffering is inevitable."

The oracular style, however, being no longer in fashion, I shall in plain language give the solution of this enigma.

When a punishment is denounced against the breach of a law, if the law be not broken, no one need be punished. When a reward is promised to obedience, if everybody obey the law, everybody ought to be rewarded. A demand for rewards is thus created: and these rewards can only be derived from the labour of the people, and contributions levied upon their property.

In comparing the respective properties of punishment and reward, we shall find that the first is *infinite* in quantity, *powerful* in its operation, and *certain* in its effect, so that it cannot be resisted: that the second is ex-

* See *Principles of Penal Law*, Part III. Chap. XI. Vol. I. p. 556.

† *L'an* 2440, by M. Mercier; a species of Utopian romance, of which the idea was ingenious, but the execution weak.

tremely *limited* in quantity, oftentimes *weak* in its operation, and at all times *uncertain* in its effect; the desire after it varying exceedingly, according to the character and circumstances of individuals. We may remark again, that the prospect of punishment saddens, whilst that of reward animates the mind; that punishment blunts, while reward sharpens the activity; that punishment diminishes energy, while reward augments it.

It is reward alone, and not punishment, which a man ought to employ, when his object is to procure services, the performance of which may or may not be in the power of those with whom he has to do. This considered, were it necessary to draw a rough line between the provinces of reward and punishment in a few words, we might say, that punishment was peculiarly suited to the production of acts of the negative stamp — reward to the production of acts of the positive stamp. To sit still and do nothing, is in the power of every man at all times: to perform a given service is in many instances in the power of one individual alone, and that only upon one individual occasion. This arrangement of nature suits very well with the unlimited plenitude of the fund of punishment on the one hand, and the limited amplitude of the fund of reward on the other. The negative acts, of which the peace and welfare of mankind require the performance, are incessant and innumerable, and must be exacted at the hands of every man: the positive acts, of which the performance is required, are comparatively few, performable only by certain persons, and by them on certain occasions only. Not to steal, not to murder, not to rob, must be required at all times at the hands of every man: to take the field for the purpose of national defence — to occupy a place in the superior departments of executive or legislative government — are acts which it is neither necessary nor proper to exact at the hands of more than a few, or of them except on particular occasions. To discover a specific remedy for a disease, to analyze a mineral, to invent a method of ascertaining a ship's longitude within a given distance, to determine the quadrature of such or such a curve, — are works which, if done by one man, need never be done again.

It is thus also with regard to such extraordinary services as depend upon accident; such as the giving of information when required, either in the judicial or any other branch of administration. Are you ignorant whether an individual is in possession of the information in question, or if in possession of it, whether he be disposed to communicate it? Punishment would most probably be both inefficacious and unjust as a means of acquiring this knowledge: resort, then, to reward.

In regard to extraordinary services depending upon personal qualification, the impropriety of punishment and the propriety of reward are the greater, when the utility of the service is susceptible of an indeterminate degree of excellence; as is the case with works of literature, of science, and the fine arts. In these cases, reward not only calls forth into exercise talents already existing, but even creates them where they did not exist. It is the property of hope, one of the modifications of joy, to put a man, as the phrase is, into spirits; that is, to increase the rapidity with which the ideas he is conversant about succeed each other, and thus to strengthen his powers of combination and invention, by presenting to him a greater variety of objects. The stronger the hope, so that it have not the effect of drawing the thoughts out of the proper channel, the more rapid the succession of ideas; the more extensive and varied the trains formed by the principle of association, the better fed, as it were, and more vigorous, will be the powers of invention. In this state, the attention is more steady, the imagination more alert, and the individual, elevated by his success, beholds the career of invention displayed before him, and discovers within himself resources of which he had hitherto been ignorant.

On the one hand, let fear be the only motive that prompts a man to exert himself, he will exert himself just so much as he thinks necessary to exempt him from that fear, and no more: but let hope be the motive, he will exert himself to the utmost, especially if he have reason to think that the magnitude of the reward (or what comes to the same thing, the probability of attaining it) will rise in proportion to the success of his exertions.

Such is the nature of extraordinary services, that it is neither practicable nor desirable for them to be performed by a large multitude of persons. If punishment, then, were the means employed to induce men to perform them, it would be necessary to pitch upon some select persons as those on whom to impose the obligation. But of the personal qualifications of individuals, the legislator, as such, can have no knowledge. The case will also be nearly the same, even with the executive magistrate, if the number of the persons under his department be considerable: for antecedently to specific experience in the very line in question, a man's personal qualifications for any such extraordinary task are not to be conjectured *a priori*, but from an intimate acquaintance — such an acquaintance as it is impossible a man should have with a large number. The consequence is, that among any multitude of persons thus taken at random, the greater number would not perform the task, because they would not be able to perform it. But in this case, by the supposition, they must all be punished: here

there would be a vast mass of punishment laid on in waste, and perhaps the end not compassed after all — a mass of punishment imparting beyond comparison more pain than it would cost to provide a sufficient quantity of rewards.

On the other hand, let reward be employed, and not an atom need be spent in waste; for it may be easily so applied, and it is common so to apply it, that it shall be bestowed in those instances only in which the end is compassed — in those instances in which not only a benefit is attained, but a benefit more than equivalent to the expense. By punishment, a great expense would be incurred, and that for the sake of a faint chance of success; by reward, a small expense is incurred, and that not without a certainty of success.

Again, punishment in these cases would not only be less likely to produce the requisite effect, but would have a tendency to prevent it. How little soever the magistrate might be qualified to collect and to judge of appearances of capacity, for such appearances he would, however, naturally keep some sort of look-out. To exhibit those appearances would therefore be to run a chance of incurring the obligation and the punishment annexed to it. The consequence is obvious: to make sure of not appearing qualified, men would take care not to be so. We are told, that in Siam, when a man has a tree of extraordinary good fruit, it is seized for the king's use. If this be true, we may well imagine that gardening does not make any very extraordinary progress in the neighbourhood of the court of Siam. Nature must do much, for art, we may be certain, will do nothing. We are told upon better authority, of a time when it was the custom to give commissions to officers to look out for the best singers, and press them into the king's service: unless they were well paid at the same time, which would have rendered the alarm occasioned by pressing needless, one would not give much to hear the music of that day.

That selection, which in cases like these is so impracticable in public, is not equally so in domestic life. To parents and other preceptors, it is by no means impracticable to make use of punishment as a motive. They are enabled to use it, because the intimacy of their acquaintance with their pupils in general enables them to give a pretty good guess at what they are able to perform. It may, perhaps, even be necessary to have recourse to this incentive — before the natural love of ease has been got under by habit, and especially before the auxiliary motive of the love of reputation has taken root, and while the tender intellect has not as yet acquired sufficient expansion and firmness to receive and retain the impressions of distant pleasures.

I say perhaps — for it certainly might be practicable to do with much less of this bitter recipe, than in the present state of education is commonly applied. All apparatus contrived on purpose might at least be spared. Towards providing a sufficient stock of incentives for all purposes, a great deal more might be done than is commonly done, in the way of reward alone: by a little ingenuity in the invention, and a little frugality in the application; by establishing a constant connexion between enjoyment and desert; granting little or nothing but what is purchased; and thus transforming into rewards the whole stock of gratification, or at least so much of it as is requisite. If punishment should still be necessary, mere privations seem to afford in all cases a sufficient store. A complete stock of incentives might thus be formed out of enjoyments alone: punishment, by the suspension of such as are habitual: reward, by the application of such as occasionally arise.*

But even when applied by parents and preceptors, punishment, how well soever it may succeed in raising skill to its ordinary level, will never raise it higher: one of the imperfections of punishment remains still insuperable. Accordingly, in the training of young minds to qualify them for the achievement of extraordinary works of genius, the business is best managed, and indeed in a certain degree is commonly managed, by punishments and rewards together; in such sort, that in the earlier part of man's career, and in the earlier stages of the progress of talent, a mixture of punishments and rewards both shall be employed: and that, by degrees, punishment shall be dropt altogether, and the force employed consist of reward alone.

There remains the case in which reward

* See the chapter on Punishments and Rewards in *Practical Education*, by Maria and Lovell Edgeworth — a work which ought to be in the hands of every parent.

No one who takes any interest in the public welfare, can be unacquainted with the plans of education introduced by Mr. Lancaster. Among other contrivances to which his success may be attributed, his system of rewards occupies a conspicuous place. His school-room resembled a toy shop: little carriages, wooden horses, kites, balls, and drums, were suspended by ropes or hung upon the posts, and the walls were ornamented with halfpenny and penny prints. Every candidate for reward, thus had always before his eyes the object of his desire, and he knew the price he must pay for the possession of it. Among so large a number of boys, it has, however, been found necessary to employ severer punishments than such as consist in a mere privation of pleasure. Those selected by Mr. Lancaster depend exclusively upon the dread of shame, and have been made uniformly emblematical or characteristic. Their efficacy far exceeds that of corporal punishment, which children are apt to make it a point of honour to brave, which they habituate themselves to suffer, or which inspires them with a decided aversion for study.

is proper, because punishment — at least punishment alone — would be unprofitable. By unprofitable, I mean not inefficacious, but uneconomical, unfrugal — the interest of the whole community together being taken into the account, not forgetting that of the particular member on whom the burthen would be to be imposed, and consequently the punishment, in case of non-performance, to be inflicted.

This seems to be the case with all those offices which, standing alone, are *offices of mere burthen*, whether the party favoured be the public at large or any individual or class of individuals: in all cases the labourer is worthy of his hire; and unless it be when every man must labour, no man ought to be made to labour without his hire — the common soldier no more than the general, the common seaman no more than the admiral, the constable no more than the judge.

True it is, that take any man for example, it may with propriety be said, that the public has a right to his services, has a right to command his services, for that the interest of any one man ought to give way to the interest of all. But if this be true as to any one man who happens to be first taken, equally true is it of any other, and so in succession of every man. On the one hand, then, each man is under an obligation to submit to any burthen that shall be proposed; on the other hand, each man has an equal right to see the burthen imposed, not upon himself, but upon some other. If either of these propositions be taken in their full extent, as much may be said in favour of the one of them as of the other. In this case, if there were no middle course to take, things must rest in *statu quo*, the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's; the burthen would be borne by nobody, and the immunity of each would be the destruction of all. But there is a middle course to take, which is, to divide the burthen, and lay it in equal proportion upon every man.

The principle is indisputable: the application of it is not free from difficulties. There are many cases in which the individual burthen cannot be divided: an office, the duties of which it requires but one man to perform, cannot be divided amongst a thousand. But a mass of profit may be formed sufficient to counterbalance the inconvenience which a man would sustain by bearing the office. Let the requisite mass of profit be taken from the general fund, and the burthen is distributed proportionably amongst the different members of the community.*

An expedient sometimes practised in these cases, is, instead of distributing the burthen of the office, to lay it on entire upon some one person, according to lot. This prevents the injustice there would be in laying it upon any one by design: but it does not correct the inequality. The mischiefs of partiality and injustice are obviated; but not so the sufferings of him upon whom the unfortunate lot falls. The principle of utility is in this case only partially followed.

It is one of those instances in which the principle of utility would seem to have given occasion to a wrong conclusion. According to this principle, it is said that the interest of the minority ought to be sacrificed to that of the majority. The conclusion is just, if it were impossible to avoid a sacrifice; palpably false, if it is. But to charge this as a defect upon the principle itself, is as reasonable as it would be to maintain that the art of book-keeping is a mischievous art, because entries may be omitted.

We are now prepared for establishing a comparison between punishment and reward.

1. Punishment is best adapted for restraint or prevention — reward for excitement and production: the one is a bridle, the other, a spur.

2. In every case where very extensive mischief may be produced by a single act, and particularly in the case of such acts as may be performed at any time, punishment is the only restraint to be depended on: such is the case of crimes in general. When the act endeavoured to be produced is in an eminent degree beneficial, it is proper to employ reward alone, or to combine punishment with reward, that the power of the governing motive may be doubled.

3. Considering the abundance of the one, and scarcity of the other, punishment is the only eligible means of regulating the conduct of people in general: reward ought to be reserved for directing the actions of particular individuals. By punishment, mischievous propensities are subdued; by reward, valuable qualifications are improved. Punishment is an instrument for the extirpation of noxious weeds: reward is a hotbed for raising fruit, which would not otherwise be produced.

4. Necessity compels the employment of punishment: reward is a luxury. Discard the first, and society is dissolved: discard the other, and it still continues to subsist, though deprived of a portion of its amenity and elegance.

5. In every case where the service is of such a nature as that no individual possessed

* This supposes the reward to consist in money: if a sufficient reward can be provided out of honour, or power, without money, the burthen of it in the former case is distributed of course among all the members of the community over whom the honour gives precedence; in the latter case it is distributed, according to the nature of the power, among all those who are subjected to that power.

of the qualifications requisite for its performance can with certainty be selected, the denunciation of punishment would only produce apprehension and misery, and its application be but so much injury inflicted in wanton waste.

In every such case, offer a reward, and it travels forth in quest of hidden or unknown talents: even if it fail in its search, it produces no evil — not an atom of it is lost: it is given only when the service is performed, when the advantage obtained either equals or surpasses the expense.

By the help of these observations, we shall be enabled to appreciate the opinion of those politicians who, after a superficial examination of this subject, condemn legislators in general for the sparing use made of the matter of reward.

The author of *The Wealth of Nations*, who has displayed such extraordinary sagacity in all his researches, has upon this point been led away by mistaken notions of humanity. "*Fear*," says he, "*is in almost all cases a miserable instrument of government.*" * It is an instrument which has oftentimes been much perverted from its proper use; but it is a necessary instrument, and the only one applicable to the ordinary purposes of society.

A young king, in the first ardour for improvement, having resolved to purge his kingdom from all crimes, was not satisfied with this alone. His natural gentleness was shocked at the idea of employing punishment. He determined to abolish it altogether, and to effect everything by reward. He began with the crime of theft: but in a short time, all his subjects were entitled to reward; all of them were honest. Every day they were entitled to new rewards; their honesty remained inviolate. A scheme for preventing smuggling was proposed to him. "Wise king," it was said, "for every penny that ought to be paid into your treasury, give two, and the hydra is vanquished." The victory was certain; but he perceived that, like that of Pyrrhus, it would be somewhat costly.

A distinction which exists between domestic and political government may be here worth noticing. No sovereign is so rich as to be able to effect everything by reward: there is no parent who may not. At Sparta, a bit of black bread was the reward of skill. The stock of pleasures and of wants is an inexhaustible fund of reward in the hands of those parents who know how to employ it.

CHAPTER VIII.

REMUNERATION — WHERE HURTFUL.

A REWARD is mischievous when its tendency is to produce offences, or to give birth to noxious dispositions.

To offer a reward to an individual as an inducement to him to commit an act prohibited by law, is to attempt to suborn him: the offence may be called *subornation*. Upon the present occasion, this illegal subornation is not the subject of consideration. The rewards of which we are about to speak, have a corruptive tendency, but do not possess the character of crimes; they are authorized by custom, sanctioned by the laws, and given and received without disguise, without criminal intention: the evil is done with a pure conscience, and often with the public approbation. They are the result of erroneous conceptions, the effects of universal prejudice, or *long-established habit*, which, as Montaigne says, *blunts the acuteness of the judgment.*

The present is one of those extremely delicate topics, in respect of which it may be more prudent to put the reader in the path of truth, and leave him to travel by himself in quest of discoveries, than going through the subject in detail, to wound established opinions, or interfere with individual interests. Without restricting myself to any precise order, I shall therefore exhibit some few examples in which the mischievous tendency is too palpable to admit of denial, and I shall begin with an incontrovertible maxim, which will furnish the criterion of which we are upon the present occasion in search for distinguishing good from evil: —

"Upon all occasions avoid bestowing any-
"thing in the shape of reward, which may
"tend to interfere with the performance of
"duty."

According to this rule, a judge ought not to find himself interested in the prolongation of law proceedings — the minister of state in the promotion of wars — the superintendent in promoting expense — the moral preceptor in setting an example of insincerity — the man of letters in maintaining mischievous prejudices at the expense of truth. The more narrowly we scrutinize into the sources of public evils, the more thoroughly shall we be convinced that they ought to be attributed to the neglect of this fundamental rule.

In support of this maxim, it is not necessary to ascribe to men in general an extraordinary proclivity towards corruption: ordinary prudence and probity are sufficient to enable a man to resist temptations to crimes, or to lead him to abstain from whatever is reputed dishonourable; but it requires somewhat more than ordinary honesty and prudence to be proof against the seductions of an interest that acts with continual energy, and whose temptations are not opposed either by the fear of legal punishment, or the condemnation of public opinion: to yield to such temptations, it is only necessary for him to follow in the beaten track, in which he will be cheered by the presence of a multitude of fellow-travel-

* Wealth of Nations, B. V. ch. 16.

lers, and encouraged by the example of his superiors. To resist these seductions, he must expose himself to the imputation of singularity — he must proclaim that he is better than others — he must condemn his colleagues and predecessors, and be bold enough to make an exhibition of his probity. Such magnanimity is not altogether unexampled, but we must not reckon upon prodigies. There are even some cases in which, by its secresy, this seductive interest is so much the more mischievous: it operates like a concealed magnet, and produces errors in the moral conduct against which there has been no previous warning. We have said that the legislator ought to endeavour to combine interest with duty; for a still stronger reason ought he to avoid as much as possible everything that yields to the public functionary a certain or a casual, a known or an unknown profit, resulting from the omission or violation of his duties: we now proceed to give a few examples.

In England, the superior judges, beside their ample salaries, which it would be improper to grudge them, receive certain fees which it is impossible not to grudge them; since it is from this source alone that they can generally be considered liable to corruption, and that so much the more easily, since they may be subject to its influence without themselves perceiving it. These fees are multiplied in proportion to the incidents of procedure, the multiplication of which incidents proportionably increases the expense and delay of obtaining justice. In one case, a judge receives nearly £4 for tying, for six months or a year, the hands of justice; and this in one of those cases in which indolence adds her seductions to those of avarice, and the whole is effected in the presence of no other witnesses than such as are urged onward by a still stronger interest to aggravate the abuse.

Another example from among a thousand. Under the Lord Chancellor, there are twelve subordinate judges called *Masters in Chancery*. When an account is to be taken before them, the following is the mode of procedure: The attorneys on the one side and the other ought to appear before the master, either alone, or in company with counsel, as may be convenient. First summons; nobody appears: second summons; nobody appears: at length, third summons; the parties appear, and the matter is put into train. Care, however, has been taken to allow only half an hour or an hour to each set of suitors. The parties are not always punctual: the matter is begun, the clock strikes, and then the matter is dismissed. At the following hearing it is necessary to begin again. All this is matter of etiquette. At each summons, the fees to the judges and the counsel are renewed. All the world must live. Extortion, it is said, is to be banished from the dwellings of finance. At some future day, perhaps, it will not be found a fitting guest for the Temple of Justice — it will be deemed advisable to chase it thence.

In England as elsewhere, it is asked, why lawsuits are eternal? The lawyers say it is owing to the nature of things. Other people say it is the fault of the lawyers. The above two little traits, which are as two grains of sand picked up in the deserts of Arabia, may assist the judgment as to the causes of delay in such procedures.

3. Previously to the year 1782, the emoluments of the paymaster of the army, whose duty as such consisted in signing, or knowing how to sign, his name, were considerably higher in time of war than in time of peace, being principally constituted of a per centage on the money expended in his department. This great officer, however, always found himself a member of parliament; and it is believed he was thus paid, not for signing, or knowing how to sign, his name, but for talking, and knowing how to talk. Upon a question of peace or war, the probity of this orator must have found itself in somewhat an awkward predicament, continually besieged as it must have been by *Bellona* with the offer of an enormous revenue, which was to cease immediately he suffered himself to be corrupted by *Peace*. When the question of economical reform was upon the carpet, this place was not forgotten. It was generally felt at that time, that so decided an opposition between interest and duty was calculated to produce the most pernicious consequences. The emoluments of peace and war were, therefore, equalized by attaching a fixed salary to the office, and the same plan was adopted with respect to various other offices.

In running over the list of functionaries, from the highest to the lowest, one cannot but be alarmed at the vast proportion of them who watch for war as for a prey. It is impossible to say to what a degree, by this personal interest, the most important measures of government are determined. It cannot be supposed that ministers of state, generals, admirals, or members of parliament, are influenced in the slightest degree by a vile pecuniary interest. All these honourable persons possess probity as well as wisdom, so that a trifle of money never can produce the slightest influence upon their conduct, not even the effect of an atom upon the immoveable mass of their probity. The mischief is, that evil-minded persons are not convinced by their assertion, but continue to repeat, that — "The honesty which resists temptation is most noble, but that which flies from it is most secure."*

* "Judge A. has a noble soul," was one day said to me by one of his friends: "this is what he told me was the difference between himself

4. In public and private works of all descriptions, it is customary to pay the architect a per centage upon the aggregate amount expended. This arrangement is a good one, when the sum to be expended is fixed: there is danger in the contrary case, since the greater the expense, the greater is the architect's pecuniary profit.

5. Veracity is one of the most important bases of human society. The due administration of justice absolutely depends upon it; whatever tends to weaken it, saps the foundations of morality, security, and happiness. The more we reflect on its importance, the more we shall be astonished that legislators have so indiscreetly multiplied the operations which tend to weaken its influence.*

When the possession of the revenues, or other privileges attached to a certain condition of life, depends upon the previous performance of certain acts which are required at entering upon that condition, these privileges cannot fail to operate upon individuals as incentives to the performance of those acts: the effect produced is the same as if they were attached to such performance under the title of reward.

If, among the number of these acts, promises which are never performed are required under the sanction of an oath, these privileges or other advantages can only be regarded as rewards offered for the commission of perjury. If among the number of these acts, it be required that certain opinions which are not believed should be pretended to be believed, these advantages are neither more nor less than rewards offered for insincerity. But the sanction of an oath once contemned, is contemned at all times. Oaths may afterwards be observed, but they will not be observed because they are oaths.

In the university of Oxford, among whose members the greater number of ecclesiastical benefices are bestowed, and which even for laymen is the most fashionable place of education, — when a young man presents himself for admission, his tutor, who is generally a clergyman, and the vice-chancellor, who is also a clergyman, put into his hands a book of statutes, of which they cause him to swear to observe every one. At the same time, it is perfectly well known to this vice-chancellor and to this tutor, that there never has been any person who was able to observe all these statutes. It is thus that the first lesson this young man learns, and the only lesson he is sure to learn, is a lesson of perjury.†

Nor is this all: his next step is to subscribe, in testimony of his belief, to a dogmatical formulary composed about two centuries ago, asserted by the Church of England to be infallibly true, and by most other churches believed to be as infallibly false. By this expedient, one class of men is excluded, while three classes are admitted. The class excluded is composed of men who, either from a sense of honour, or from conscientious motives, cannot prevail upon themselves publicly and deliberately to utter a lie. The classes admitted consist — 1. Of those who literally believe these dogmas; 2. Of those who disbelieve them; 3. Of those who sign them as they would sign the Alcoran, without knowing what they sign, or what they think about it. A nearly similar practice is pursued at Cambridge; and from these two sources the clergy of the Church of England are supplied.

Socrates was accused as a corruptor of youth. What was meant by this accusation, I know not. But this I know, that to instruct the young in falsehood and perjury, is to corrupt them; and that the benefit of all the other lessons they can learn can never equal the mischief of this instruction.‡

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and Judge B. Consider him well: he will never listen to a single word which has the slightest connexion with any suit which may be brought before him, unless in open court: he fears lest he should be misled, so weak is he: he has told me so himself. Whilst, as to me, a suitor might whisper in my ear, from morning till night, and might as well have been talking to a deaf man."

I would not insinuate the least suspicion against the valorous judge; had I been constrained to form one, it would have been dissipated by the elogium he bestowed upon his friend.

The heroism of Lord Hale, the model of the English judges, took a contrary direction. It had been customary, when upon the circuit, for the judge to receive from the sheriff a certain number of loaves of sugar. On one occasion, a sheriff who happened to have a suit which was to be tried before him, waited upon his lordship, and, as was customary, presented his sugar: Hale would not receive it. The other judge, if he had been consistent, would have taken sugar from everybody.

General rule. — When an honest man is desirous of establishing his honesty, he ought to employ proofs which will serve only for this purpose, and not such as dishonesty alone can be interested in causing to be received.

Before an assembly of the Roman people, it was required of Scipio that he should render his accounts. His answer was — "Romans, on such a day I gained a victory: let us ascend to the Capitol, and return thanks to the Gods." His quietus was granted immediately; and since that day, besides allowing that Scipio was a great warrior, all the historians have been assured of the correctness of his accounts. As to me, had I lived at that time, most probably I should have gone up with the rest to the Capitol, but I should always have retained a little curiosity with respect to the accounts.

* See *Principles of Penal Law*, Part III. Chap. XVIII. *Of the Employment of the Religious Sanction*, Vol. I. p. 364.

† See further upon this subject in Mr. Bentham's work, entitled, *Swear not at all*, Vol. V. of this collection.

‡ See Appendix (A.)

6. It may be inquired, whether rewards or other advantages ought to be offered for the defence of any opinion in matters of theory or science, or any other subject upon which opinions are divided?* If the question be one of pure curiosity, the worst that can happen will be that the reward will be expended in waste. But if the opinion thus favoured happen to be a false one, and at the same time mischievous, the reward will be productive of unmixed evil. But whether it be a question of curiosity or use, if truth be the object desired, the chance of obtaining it is not so great as when the candidates for reward are allowed to seek it wheresoever it may be to be found. If error be to be defended, to offer a reward for its defence would be one, if not the only, method to be adopted. Who is there that does not perceive, that to obtain true testimony, it is inexpedient to offer a reward to the witness who shall depose upon a given side? — who does not know that the constant effect of such an offer is to discredit the cause of him who makes it? If, then, anything be to be gained by such partiality, it can only be by error: truth can only be a loser by such partial reward.

This practice is attended with another and more manifest inconvenience: it is that of causing opinions to be professed which are not believed — of inducing a truculent exchange, not only of truth, but of sincerity, for money.

I do not know if governments ought even to permit individuals to offer rewards upon these conditions. To establish error, to repudiate truth, to suborn falsehood; — these, in a few words, are the effects of all rewards established in favour of one system to the exclusion of all others.

7. Charity is ever an amiable virtue; but if injudiciously employed, it is liable to produce more evil than good. Hospitals inconsiderately multiplied, regular distributions of provisions, such as were formerly made at the doors of many convents in Spain and Italy, tend to habituate a large proportion of the people to idleness and beggary. A reward thus offered to indolence, impoverishes the state and corrupts the people. *Luxury* (and I annex to this word whatever meaning, except that of prodigality, people choose to give to it) luxury, that pretended vice so much reprobated by the envious and melancholic, is the steady and natural benefactor of the human species; it is a master who is always doing good, even when he aims not at it; he rewards only the industrious. Charity is also a benefactor, but great circumspection is required that it may prove so.

8. There is another manner in which reward may be mischievous: by acting in opposition to the service required — when, for example, the emoluments attached to an office are such as to afford the means and temptation not to fulfil the duties of it. In such a case, what may appear a paradox is not the less a great truth: *the whole does less than a part;* by paying too much, the sovereign is less effectually served. But this subject belongs naturally to the head of *salaries*.

9. Whatever weakens the connexion between punishments and offences, operates in proportion as an encouragement to the commission of offences. It has the effect of a reward offered for their perpetration, for whether the inducement to commit offences be augmented, or the restraining motives debilitated, the result in both cases is the same.

Thus, a tax on justice is an indirect reward offered for injustice. The same is the case with respect to all technical rules by which, independently of the merits, nullities are introduced into contracts and into procedure — of every rule that excludes the evidence of a witness, the only depository of the fact upon which depends the due administration of justice. In a word, it is the same with every thing that tends to loosen the connexion between injury and compensation, between the violation of the law and punishment.

If we open our eyes, we shall behold the same legislators establishing rewards for informers, and taxes and fees upon law proceedings: they desire that the first should induce men to render them services of which they stand in need, whilst the latter tend to weaken the natural disposition which is felt to render these same services. At the threshold of the tribunal of justice are placed a bait and a bugbear: the bait operates upon the few — the bugbear upon the multitude.

10. There are cases in which, to avoid a greater inconvenience, it has been found necessary to dispose of the matter of reward in such manner as that it shall operate as a reward for the most atrocious crime; yet, in spite of the force of the temptation, this crime is almost unexampled. I allude to the rule established with respect to successions. Happily, whatever may be the force of the seductive motives in this case, the tutelary motives act in full concert with all their energy. There are many men who for a trifling personal benefit, for an advance in rank, or even to gratify their spleen, would without scruple use their utmost exertions to produce a war that would cost the lives of two or three hundred thousand of their fellow-creatures; while among these men there would not be found perhaps one, who, though he were set free from the dread of legal punishment, could be induced, for a much greater advantage, to attempt the life of a single individual, and still less the life of a parent whose death would put him in possession of a fortune or a title.

* See Appendix (B.)

But though laws cannot be framed for its complete removal, nothing which can be done without inconvenience, ought to be left undone, towards the diminution of this danger. The persons most exposed to become its victims, are those who are necessarily placed under the controul of others, such as infants and women. It is under the guidance of this principle, that our laws in some cases have selected as guardians those persons upon whom no interest can devolve in the way of succession. Under the laws of Sweden, precautions of the same description are observed; and it has been elsewhere shown that this consideration furnishes one of the arguments in favour of the liberty of divorce.*

Contracts relating to insurance furnish another instance of the same danger. These contracts, in other respects so beneficial, have given birth to a new species of crime. A man insures a ship or a house at a price greatly beyond its value, with the intention of setting fire to the house or causing the ship to be lost, and then, under pretence of compensation for the loss of which he is the author, claims the money for which the insurance is made. Thus one of the most beneficial inventions of civilized society is converted into a premium for dishonesty, and a punishment to virtuous industry. Had the commission of this crime been attended with less risk, or been less difficult to conceal, this most admirable contrivance for softening inevitable calamities must have been abandoned.

CHAPTER IX.

REMUNERATION — WHERE NEEDLESS.

Factitious reward is superfluous, whenever natural reward is adequate to produce the desired effect.

Under this head may be classed all inventions in the arts, which are useful to individuals, and whose products may become articles of commerce. In the ordinary course of commerce, the inventor will meet with a natural reward exactly proportionate to the utility of his discovery, and which will unite within itself all the qualities which can be desired in a factitious reward. After the most mature consideration, no sovereign can find another measure so exact as is thus afforded by the free operations of trade. All that the government has to do is to secure for a time, to the inventor, whatever benefit his discovery may yield. This is generally done by the grant of an exclusive privilege or patent. Of this we shall elsewhere speak more in detail.

Not many years ago a grant of £3000 was made by parliament to a physician for the discovery of a yellow dye. That money might, without doubt, have been worse employed. But the reward was unnecessary: for this discovery, as for all others in the arts, the proper test of its utility would have been its use in manufactures and commerce. The grant of a determinate sum was a loss either to the inventor or to the public: to the inventor, if it were less than he would have gained under a patent: to the public, if it were more. In a word, wherever patents for inventions are in use, factitious reward is either groundless or superfluous.†

I shall elsewhere treat of the encouragements to be given to the arts and sciences. Upon the present occasion, all that I shall observe is, that the greater the progress they have made, the less necessary is it to tax the public for their support. In this country, for example, if the exclusive property in his work be secured to an author, a reward is at the same time secured to him proportionate to the service he has performed—at least in every branch of amusement or instruction that yields a sufficient class of readers. There is no patron to be compared with the public; and by the honour with which it accompanies the other rewards it bestows, this patronage has a decided advantage over any that can be received from any other source.

With respect to the rewards that in some European states have been bestowed upon poets, the amount of them is so insignificant as to save them from the severe scrutiny to which they might, under other circumstances, have found themselves exposed. There are some countries in which the relish for literature is confined to such small numbers, that it may, upon the whole, be beneficial to encourage it by factitious rewards. But if we consider how intense are the enjoyments of the man born with poetic talents, the sudden reputation which they produce, and the ample profit they often yield, especially in the dramatic line, it will be found that the na-

* See *Principles of the Civil Code*, Vol. I. p. 352.

† Parliament has granted, in two several sums, £20,000 to Dr. Jenner, so celebrated by his invention or introduction of the system of vaccination. This may be considered, perhaps, rather as an indemnification than a reward — at least than a reward proportionate to the service: I say indemnification, because the labour, the researches, the correspondence, the time employed in committing to writing, in teaching and in establishing, his new system, were so many sacrifices of the profits of his profession. As to the natural reward that he gained by his discovery, it was nothing: it impoverished instead of enriching him. The liberality with which the physicians throughout Europe have encouraged a discovery that has lopped off one of the most lucrative branches of their profession, is a most hononurable feature in the annals of medicine. When shall we see the lawyers entering into rivalship with them, by the discovery and propagation of the most simple and expeditious mode of legal procedure?

tural rewards attached to them are far from being inconsiderable; and that, at least, our attention ought, in the first place, to be directed to the department of the sciences, the approaches to which are repulsive, and the utility of which is indisputable. Happiness depends upon the correctness of the facts with which our mind is furnished, and the rectitude of our judgment; but poetry has no very direct tendency to produce either correctness of knowledge or rectitude of judgment. For one instance in which it has been employed to combat mischievous prejudices, a thousand might be cited in which they have been fostered and propagated by it. Homer is the greatest of poets: where shall we place him among moralists? Can any great advantage be derived from the imitation of his gods and heroes? I do not condemn prizes for poetry where the object is to excite youthful emulation: I only desire that serious and truly useful pursuits may receive a proportionate encouragement.

CHAPTER X.

PROPORTION AS TO REWARDS.

In conferring reward, the observance of exact rules of proportion is not nearly of the same importance, as in the infliction of punishment. These rules cannot, however, be neglected with impunity. If too great a reward be held out for a given service, competitors will be attracted from more useful pursuits. If too little, the desired service will either not be rendered, or will not be rendered in perfection.

Rule I. The aggregate value of the natural and factitious reward ought not to be less than sufficient to outweigh the burthen of the service.

Rule II. Factitious rewards may be diminished, in proportion as natural rewards are increased.

These two rules present three subjects to our observation: — 1. The natural burthens attached to the service; — 2. The natural rewards which either do or do not require factitious reward to supply their deficiency; — 3. The drawback, more or less hidden, which in a variety of cases alters the apparent value of the reward.

1. The natural burthens of any particular service, may be comprised under the following heads: — The intensity of labour required in its performance, — the ulterior uneasiness which may arise from its particular character, — the physical danger attending it, — the expenses or other sacrifices necessarily made previously to its exercise, — the discredit attached to it, — the peculiar enmities it produces. The wages of labour in different branches of trade, are regulated in exact proportion to the combination of these several circumstances. To the legislator, however, except in cases where it may be necessary to add factitious to natural reward, considerations of this sort are in general subjects only of speculation.*

That any particular service is more or less highly priced, is of little importance: it affects the individuals only who stand in need of it. The competition between those who want and those who can supply, fixes the price of all services in the most fitting manner. It is sufficient that the demand be public and free. To assist, if necessary, in giving publicity to the demand, and in maintaining reciprocal liberty in such transactions, is all that the legislator ought do do.

2. Natural rewards are liable to be insufficient, in relation to services, whose utility extends to the whole community, without producing particular advantage to any one individual more than another. Of this nature are public employments. It is true, many public employments are attended by natural rewards in the shape of honour, power, the means of serving one's connexions, and deserving the public gratitude: and when these rewards are sufficient, factitious rewards are superfluous. To their ambassadors, and many others of their great officers of state, the Venetians never gave any pecuniary reward. In England, the public functions of sheriffs and justices of the peace are generally discharged by opulent and independent individuals, whose only reward consists in the respect and power attached to those offices.

3. There are many circumstances which may diminish the value of a reward, without being generally known beforehand, but against all of which it is proper to guard. Does the reward consist of money? Its value may be diminished by a burthen of the same nature, or by a burthen in the shape of honour. Honour and money may even be seen at strife with one another, as well as with themselves. By these means, the value of a reward may sometimes be reduced to nothing, and even become negative.

In this country, where, properly speaking, there is no public prosecutor, many offences, which no individual has any peculiar interest in prosecuting, are liable to remain unpunished. In the way of remedy, the law offers from £10 to £20, to be levied upon the goods of the offender, to whoever will successfully undertake this function: sometimes it is added, that the expenses will be repaid in case of conviction: sometimes this is not promised. These expenses may amount to thirty, fifty, and even one hundred pounds; it is seldom

* In *The Wealth of Nations*, b. i. chap. x. the circumstances which cause the rate of wages to vary in different employments, are analyzed with the sagacity which characterizes the father of political economy.

they are so little as twenty pounds. After this, can we be surprised that the laws are imperfectly obeyed?

It may be added, that it is considered dishonourable to attend to this summons of the laws. An individual who in this manner endeavours to serve his country, is called an informer; and lest public opinion should not be sufficient to brand him with infamy, the servants of the law, and even the laws themselves, have on some occasions endeavoured to fix the stain. The number of private prosecutors would be much more numerous, if, instead of the insidious offer of a reward, an indemnification were substituted. The dishonourable offer being suppressed, the dishonour itself would cease. And who can say, when by such an arrangement the circumstance which offends it is removed, whether honour itself may not be pressed into the service of the laws?

There is another case in which, by the negligence of legal and official arrangements, a considerable and certain expense is attached to and made to precede a variable and uncertain reward. A new idea presents itself to some workman or artist. Knowing that the laws grant to every inventor a privilege to enable him exclusively to reap the profits of his invention, he enjoys by anticipation his success, and labours to perfect his invention. Having, in the prosecution of his discovery, consumed, perhaps, the greater part of his property and his life, his invention is complete. He goes, with a joyful heart, to the public office to ask for his patent. But what does he encounter? Clerks, lawyers, and officers of state, who reap beforehand the fruits of his industry. This privilege is not given, but is, in fact, *sold* for from £100 to £200 — sums greater perhaps than he ever possessed in his life. He finds himself caught in a snare, which the law, or rather extortion which has obtained the force of law, has spread for the industrious inventor. It is a tax levied upon ingenuity, and no man can set bounds to the value of the services it may have lost to the nation.

Rule III. Reward should be adjusted in such a manner to each particular service, that for every part of the benefit there may be a motive to induce a man to give birth to it.

In other words, the value of the reward ought to advance step by step with the value of the service. This rule is more accurately followed in respect of rewards than of punishments. If a man steal a quantity of corn, the punishment is the same, whether he steal one bushel or ten; but when a premium is given for the exportation of corn, the amount of the premium bears an exact proportion to the amount exported. To be consistent in matters of legislation, the scale ought to be as regular in the one case as in the other.

The utility of this rule is put beyond doubt by the difference that may be observed between the quantity of work performed by men employed by the day, and men employed by the piece. When a ditch is to be dug, and the work is divided between one set of men working by the day, and another set working by the piece, there is no difficulty in predicting which set will have finished first.

Hope, and perhaps emulation, are the motives which actuate the labourer by the piece: the motive which actuates the labourer by the day is fear — fear of being discharged in case of manifest and extraordinary idleness.

It must not, however, be forgotten, that there are many sorts of work in respect of which it is improper to adopt this mode of payment; which tends indeed to produce the greatest quantity of labour, but at the same time is calculated to give birth to negligence and precipitation. This method ought only to be employed in cases where the quality of the work can easily be discerned, and its imperfections (if any) detected.

The value of a reward may be increased or diminished, in respect of certainty as well as amount: when, therefore, any services require frequently renewed efforts, it is desirable that each effort should render the probability of its attainment more certain.

Arrangements should be made for connecting services with reward, in such manner that the attainment of the reward shall remain uncertain, without, however, ceasing to be more probable than the contrary event. The faculties of the individual employed will thus naturally be kept upon the full stretch. This is accomplished when a competition is established between two or more persons, and a reward is promised to that one who shall render service in the most eminent degree, whether it respect the quantity or the quality of the service proposed.

Rule IV. When two services come in competition, of which a man cannot be induced to perform both, the reward for the greater service ought to be sufficient to induce him to prefer it to the less.

In a certain country, matters are so arranged, that more is to be gained by building ships on the old plan, than by inventing better; by taking one ship, than by blockading a hundred; by plundering at sea, than by fighting; by distorting the established laws, than by executing them; by clamouring for or against ministers, than by showing in what manner the laws may be improved. It must however be admitted, that in respect of some of these abuses, it would be difficult to prescribe the proper remedy.

By what method can competition between two services be established? The individual from whom they are required must, either from personal qualifications or external circumstances, have it in his power to render either the one or the other. It is proper to

distinguish the cases in which this position is transient, from those in which it is permanent. It is in the first that the fault committed, by suffering disproportion to subsist, is most irreparable.

During the American war, upwards of an hundred ships were at one time in one of the harbours of the revolted colonies. It was of great importance that they should be kept in a state of blockade, since many of them were loaded with military stores. An English captain received orders to blockade them. Sufficiently skilled in arithmetic, and in proverbs, to know that two or three birds in his cage were worth a hundred in the bush, he acted as the greater number of men would have acted in his place. He stood off to a sufficient distance to give the enemy hopes of escaping: as soon as they had quitted the harbour, he returned, captured half-a-dozen, and the rest proceeded to their destination. I do not answer for the truth of this anecdote; but true or not true, it is equally good as an apologue. It exhibits one of the fruits of that inconsiderate prodigality, which grants, without discrimination, the produce of their captures to the captors.

Another example. A man who has influence obtains the command of a frigate, with orders to go upon a cruise. The command of a first-rate is accepted by those only who cannot obtain a frigate. It is thus that interest is put in competition with duty — cupidity with glory. There are doubtless not wanting noble minds by whom the seductions of sinister interest are resisted: but wherefore should they be so much exposed to what it is so difficult to resist?

It is true, that their ears may not be altogether insensible to the call of honour. The law has bestowed pecuniary rewards upon the captors of armed vessels — (another example, where one instance of profusion has created the necessity of a second) — but these rewards are still unequal: the chase of doves is more advantageous than the pursuit of eagles.

The remedy would be to tax, and tax heavily, the profits of lucrative cruises, to form a fund of reward in favour of dangerous, or merely useful expeditions. By this arrangement, the country would be doubly benefited, the service would be rendered more attractive, and conducted with more economy. It may be true, that if this tax were deducted from the share of the seamen, their ardour might be cooled: neither in value or in number are their prizes in this lottery susceptible of diminution. But though this be true with respect to the lower ranks of the profession, ought we to judge in the same manner of the superior officers, whose minds are elevated as their rank, and on whose conduct the performance of the duty has the most immediate dependence?

In the judicial department, the service which belongs to the profession of an advocate, and the service which belongs to the office of a judge, are in a state of rivalry: they constitute the elements of two permanent conditions, of which the first among most nations is the preliminary route to the second. In England, the judges are uniformly selected from among the class of advocates. Now the interest of the country requires that the choice should fall upon the men of highest attainments in their profession, since upon the reputation of the judges depends the opinion which every man forms of his security. It is not of the same importance to the public that advocates should be supereminently skilful: their occupation is not to seek out what is agreeable to justice, but what agrees with the interest of the party to which chance has engaged them. On the contrary, the more decidedly any advocate is exalted in point of talents above his colleagues, the more desirable is it that he should no longer continue an advocate. In proportion to his pre-eminence, is the probability that he will be opposed to the distribution of justice. The worse the cause of the suitor, the more pressing is his need of an able advocate to remedy his weakness.

In England, the emoluments of the	Per Annum.
Lord Chancellor are reckoned at	£20,000
— Vice-Chancellor, ...	5,000
— Master of the Rolls, ...	4,000
— Chief-Justice of the King's Bench,	6,500
— Chief-Justice of the Common Pleas,	5,000
— Chief-Baron of the Exchequer, .	5,000
— Nine Puisne Judges, ...	4,000

Now, amongst the class of advocates there are always to be found about half-a-dozen whose annual emoluments average from eight to twelve thousand pounds. Of this number there is not one who would not disdain the office of puisne judge, since his profits are actually two or three times as great as theirs. To these advocates of the first class may be added as many more, who would equally disdain these subordinate situations, in the hope every day of succeeding to the advocates who shall succeed to the principal situations. There are two methods of obviating this inconvenience: the one by increasing the emoluments of the judges. (This course has been adopted upon many occasions, and they have been raised to their present amount, without success.) The other consists in lowering the profits of the advocates: a desirable object in more respects than one, but which can result only from rendering the whole system of the laws more simple and intelligible.

In the department of education, there is a nearly similar rivalry between the profession of the clergy and the office of professor, as between the profession of advocate and the

office of judge, in the department of the laws. In proportion as he is what he ought to be in order to be useful, a clergyman is a professor of morality, having for his pupils a larger or smaller number of persons of every class, during the whole course of their lives. On the other hand, a professor (as he is called) has for his pupils a number of select individuals, whose character is calculated to exercise the greatest influence upon the general mass of the people, and among their number the clergy are generally to be found. The period during which these individuals attend the lectures of the professor is the most critical period of life — the only period during which they are under obligation to pay attention to what they hear, or to receive the instruction presented to them. Such being the relation between the services of the two classes, let us see what is the proportion between the amount of reward respectively allotted to each.

In England, the emoluments of the clergy vary from £20 to £10,000 a-year, while those of the professors in the chief seats of education — the universities — are between the twentieth and the hundredth part of the latter sum. In Scotland, the emoluments of the professors differ but little from what they are in England, but the richest ecclesiastical benefice is scarcely equal to the least productive professorship. It is thus, says Adam Smith, that "in England the church is continually draining the universities of all their best and ablest members; and an old college tutor, who is known and distinguished as an eminent man of letters, is rarely to be found;" whilst in Scotland the case is exactly the reverse. It is by the influence of this circumstance that he explains how academical education is so excellent in the Scottish universities, and, according to him, so defective in those of England.

Between two professions which do not enter into competition with each other (for example, those of opera-dancers and clergymen,) a disproportion between their emoluments is not attended with such palpable inconveniences; but when by any circumstance two professions are brought into comparison with each other, the least advantageous loses its value by the comparison, and the disproportion presents to the eye of the observer the idea of injustice.

CHAPTER XI.

CHOICE AS TO REWARDS.

In making a proper selection of punishments, much skill is required: comparatively much less is requisite in the proper selection of rewards. Not only are the species of rewards more limited in number than those of punishments, but the grounds of preference are more easily discoverable, and there are not, as in the case of punishments, any passions which tend to mislead the judgment.

The *qualities desirable* in rewards are the same as in the case of punishments: we shall enumerate them, and then proceed to point out in what degree they are united in certain modes of remuneration.

A reward is best adapted to fulfil the purpose for which it may be designed, when it is —

1. *Variable*, susceptible of increase or diminution in respect of amount, that it may be proportioned to the different degrees of of service.

2. *Equable*, that equal portions may at all times operate with equal force upon all individuals.

3. *Commensurable*, with respect to other species of rewards attached to other services.

4. *Exemplary:* its apparent ought not to differ from its real value. This quality is wanting, when a large expense is incurred for the purpose of reward, without its becoming matter of notoriety. The object aimed at ought to be to strike the attention, and produce a durable impression

5. *Economical.* More ought not to be paid for a service than it is worth. This is the rule in every market.

6. *Characteristic:* as far as possible analogous to the service. It becomes by this means the more exemplary.

7. *Popular.* It ought not to oppose established prejudices. In vain did the Roman emperors bestow honours upon the most odious informers; they degraded the honours, but the informers were not the less infamous. But it is not enough that it does not oppose the prejudices: it is desirable that every reward should obtain the approbation of the public.

8. *Fructifying:* calculated to excite the perseverance of the individual in the career of service, and to supply him with new resources.

In the selection from among the variety of rewards, of that particular one which most certainly will produce any desired effect, attention must not only be paid to the nature of the service, but also to the particular disposition and character of the individual upon whom it is to operate.* In this respect, public regulations can never attain the perfection of which domestic discipline is susceptible. No sovereign can ever in the same degree be acquainted with the dispositions of his subjects, as a father may be with those of his children. This disadvantage is however compensated by the larger number of com-

* See *Principles of Morals and Legislation*, Chap. VI. *Of Circumstances influencing Sensibility*, Vol. I. p. 21.

petitors. In a kingdom, every diversity of temperament, and every degree of aptitude, may be found united together; and provided the reward be proportionate to the service, it will be of little importance what may be its nature: like the magnet, which out of a heterogeneous mass attracts and separates the most hidden particles of iron, it will detect the individual susceptible of its attraction. Besides, the nature of pecuniary reward, which is adapted to the greater proportion of services, is such that every individual may convert it into the species of pleasure which he most prefers.

To form a judgment of the merits and demerits of pecuniary reward, a glance at the list of desirable qualities will suffice. It will at once be seen which of them it possesses, and of which of them it is deficient: it is *variable*, *equable*, and *commensurable*. It ought to be added, that it is frequently indispensably necessary: there are many cases in which every other reward, separated from this, would not only be a burthen, but even a mockery, especially if the performance of the service have been attended with an expense or loss greater than the individual can easily support.

On the other hand, pecuniary reward is not exempt from disadvantages. Speaking generally (for there are many exceptions,) it is neither *exemplary*, nor *characteristic*, nor even *popular*.* When allowed to exceed a certain amount, it tends to diminish the activity of the receiver: instead of adding to his inclination to persevere in his services, it may furnish him with a temptation to discontinue them. The enriched man will be apt to think like the soldier of Lucullus, who became timid so soon as he possessed property to preserve.

Ibit eò, quo vis, qui zonam perdidit, inquit.
HOR. Epist. II. lib. 2

There are also cases in which money, instead of an attractive, may have a repulsive effect, — instead of operating as a reward, may be considered as an insult, at least by persons who possess any delicacy in their sentiments of honour. A certain degree of skill is therefore required in the application of money as a reward: it is oftentimes desirable that the pecuniary should appear only as an accessary to the honorary, which should be made to constitute the principal part of the reward.†

Every pecuniary reward may be, as it were, annihilated by its relative smallness. A man of independent fortune, and of a certain rank in society, would be considered as degraded by accepting a sum that would not degrade a mechanic. There is no rule for determining what is permitted or prohibited in this respect: custom has established the prejudice. But the difficulty it presents is not insurmountable. By combining together money and honour, a compound is formed, which is universally pleasing: medals, for example, possess this double advantage. By a little art and precaution, a solid peace is established between pride and cupidity; and thus united, they have both been ranged under the banners of merit. Pride proclaims aloud — "It is not the intrinsic value of the metal which possesses attractions for me; it is the circle of glory alone with which it is surrounded." Cupidity makes its calculation in silence, and accurately estimates the value of the material of the prize.

By the Society of Arts a still higher degree of perfection has been attained. A choice is commonly allowed between a sum of money and a medal. Thus all conditions and tastes are satisfied: the mechanic or peasant pockets the money; the peer or gentleman ornaments his cabinet with a medal.

The apparent value of medals is in some cases augmented, by rendering the design upon them characteristic of the service on account of which they are bestowed. By the addition of the name of the individual rewarded, an exclusive certificate is made in his favour. The ingenuity displayed in the choice of the design has sometimes been extremely happy.

A British statute gives to the person who apprehends and convicts a highwayman, amongst other rewards, the horse on which the offender was mounted when he committed the offence. Possibly the framer of this law may have taken the hint from the passage in Virgil, in which the son of Æneas promises to Nisus, in case of the success of the expedition he was meditating, the very horse and accoutrements which Turnus had been seen to use.‡ It is equally possible, that the same knowledge of human nature, which suggested to the Latin poet the effi-

* "*Au défaut de n'être pas dignes de la vertu*, les recompenses pécuniaires joignent celui de n'être pas assez publiques, de ne pas parler sans cesse aux yeux et aux cœurs, de disparaitre aussitôt qu'elles sont accordées, et de ne laisser aucune trace visible qui excite l'emulation en perpétuant l'honneur qui doit les accompagner." — Rousseau: *Gouvernment de Pologne*, chap. xi. The phrase in italics is one of the too common exaggerations in the writings of Rousseau. It is more striking than just.

In his letter to the Duke of Wirtemberg upon education, in which he shows that he had reflected much upon the union of interest with duty, he says — "L'argent est un ressort dans la mécanique morale, mais il repousse *toujours* la main qui le fait agir." *Toujours* is an exaggeration.

† Tel donne à pleines mains qui n'oblige personne,
La façon de donner vaut mieux que ce qu'on donne. *Le Menteur*, Scène I.

‡ Vidisti, quo Turnus equo, quibus ibat in armis
Aureus; ipsum illum clypeum, cristasque rubentes
Excipiam sorti, jam nunc tua præmia, Nise.
Æn. ix. 269.

Thou saw'st the courser by proud Turnus prest:
That, Nisus, and his arms and nodding crest.
And shield, from chance exempt, shall be thy share. DRYDEN'S *Translation.*

cacy of such a reward, suggested it at once to the English lawgiver. Be this as it may, this provision is commendable on three several accounts. In the assignment of the prize, it pitches upon an object, which, from the nature of the transaction, is likely to make a particular impression on the mind of the person whose assistance is required; acting in this respect in conformity to the rule above laid down, which recommends an attention to the circumstances influencing the sensibility of the person on whom impression is to be made. It also has the advantage of being characteristic, as well as exemplary. The animal, when thus transferred, becomes a voucher for the activity and prowess of its owner, as well as a trophy of his victory.

An arrangement like this, simple as it is, or rather because it is so simple, was an extraordinary stretch in British policy; in which, though there is generally a great mixture of good sense, there reigns throughout a kind of littleness and *mauvaise honte*, which avoids, with timid caution, everything that is bold, striking, and eccentric, scarcely ever hazarding any of those strong and masterly touches which strike the imagination, and fill the mind with the idea of the sublime.

Examples of rewards of this nature abound in the Roman system of remuneration. For every species of merit, appropriate symbolic crowns were provided. This branch of their administration preserved the ancient simplicity of Rome in its cradle; and the wreath of parsley long eclipsed the splendour of the crowns of gold. I was about to speak of their triumphs, but here I am compelled to stop: humanity shudders at that pride of conquest which treads under its feet the vanquished nations. The system of legislation ought no doubt to be adapted to the encouragement of military ardour, but it ought not to fan it into such a flame as to make it the predominant passion of the people, and to prostrate everything before it.

Honorary rewards are eminently exemplary: they are standing monuments of the service for which they have been bestowed; they also possess the desirable property of operating as a perpetual encouragement to fresh exertions. To disgrace an honorary reward, is to be a traitor to one's self; he that has once been pronounced brave, should perpetually merit that commendation.

To create a reward of this nature, is not very difficult. The symbolical language of esteem is, like written language, matter of convention. Every mode of dress, every ceremony, so soon as it is made a mark of pre-eminence, becomes honourable. A branch of laurel, a ribband, a garter — everything possesses the value which is assigned to it. It is however desirable, that these ensigns should possess some emblematic character expressive of the nature of the service for which they are bestowed. With reference to this principle, the blazonry of heraldry appears rude and unmeaning. The decorations of the various orders of knighthood, though not deficient in splendour, are highly deficient in respect of character: they strike the eye, but they convey no instruction to the mind. A ribband appears more like the finery of a woman, than the distinctive decoration of a hero.

Honorary titles have frequently derived a part of their glory from being characteristic. The place which has been the theatre of his exploits has often furnished a title for a victorious general, well calculated to perpetuate the memory of his services and his glory. At a very early period of their history, the Romans employed this expedient in addition to the other rewards which they conferred upon the general who completed a conquest. — Hence the surnames of *Africanus*, *Numidicus*, *Asiaticus*, *Germanicus*, and so many others. This custom has frequently been imitated. Catherine II. revived it in favour of the Romanoffs and Orloffs. Mahon, twice in the eighteenth century, furnished titles to its conquerors. The mansion of Blenheim unites to the eclat of the name, a more substantial proof of national gratitude.*

The Romans occasionally applied the same mode of reward to services of a different description. The Appian way perpetually recalled to the memory of those who journeyed on it, the liberality of Appius.†

The career of legislation may also furnish some instances of honours which possess this character of analogy. In the digest of the Sardinian laws, very praiseworthy care was taken to inform the people to which of their sovereigns they were indebted for each particular law. It is an example worthy of imitation. It may have been intended as a mark of respect, as well as for convenience of reference, that it has been customary to designate by the title of the *Grenville Act*, the admirable law which this representative of the people procured to be enacted for the impartial decision of questions relative to contested elections.

Had the statue of this legislator been placed

* When, after a great naval victory, as an acknowledgment of his services, the freedom of the city of London was presented to Admiral Keppel, in a box of *heart of oak* of curious workmanship, and enriched with gold, the present was *characteristic* and *popular*; allusion being evidently made to the song, which, whoever may have been the Tyrtæus, has doubtless had, at times, no inconsiderable share in rousing British courage.

† One of the noblest charitable institutions in London, *Guy's Hospital*, bears the name of its founder. It is true, it is not done with the intention of conferring a reward; but there are few who of late years have travelled in Great Britain, who have not spoken in praise of *Macadam's system* of constructing roads, now called Macadamization.

in the House of Commons, from which he banished a scandalous disorder, it would both have been a monument of gratitude, and a noble lesson. it might have for its companion a statue of his noble rival, the author of Economical Reform. It is thus that the impartial judgment of posterity, forgetting the differences which separated them, delights to recollect the excellencies which assimilated them to each other: it is thus that it has placed, side by side of each other, Eschines and Demosthenes. The more men become enlightened, the more clearly will they perceive the necessity, at least, of dividing honour between those who cause nations to flourish by means of good laws, and those who defend them by their valour.

Among the most obvious and efficacious means of conferring honorary rewards, are pictures, busts, statues, and other imitative representations of the person meant to be rewarded. These spread his fame to posterity, and, in conjunction with the history of the service, hand down the idea of the person by whom it was rendered. They are naturally accompanied with inscriptions explanatory of the cause for which the honour was decreed. When the art of writing has become common, these inscriptions will frequently give disgust, by the length or extravagance of the elogium; and it will then become an object of good taste to say as much in as few words as possible. Perhaps the happiest specimens of the kind that were, or ever will be produced, are the two inscriptions placed under the statues of Louis XIV. and Voltaire; the one erected by the town of Montpellier, the latter by a society of men of letters, of whom Frederick III. king of Prussia was one:—"*A Louis XIV. après sa mort.*" "*A Voltaire, pendant sa vie:*" To the king, though no longer the object of hope and fear: To the poet and philosopher, though still the butt of envy. The business, on occasions like these, is not to inform but to remind: history and the art of printing do the rest.

The greater number of the rewards of which we have spoken above, are *occasional*, that is, applied to a particular action. There are others which are more *permanent* in their character, such as the Hospitals of Chelsea and Greenwich, in England, and *l'Hôtel des Invalides* at Paris.

Doubts have often been entertained of the utility of these establishments. Rewards, it has been said, might be extended to a much greater number of individuals, if the annual amount of the expenses of these places were distributed in the shape of pensions, while the individuals would thus be rendered much happier, since men who have passed their days of activity, united in a place where they are no longer subject to the cares and labours of life, are exposed to the most ceaseless listlessness. I shall not dispute the truth of these observations, but on the other hand, shall examine the effect of these establishments upon the minds of soldiers and sailors. Their imaginations are flattered by the magnificence of these retreats; it is a brilliant prospect opened to them all; an asylum is provided for those who, having quitted their country and their families in their youth, have frequently, in their days of decrepitude and age, no other home in the world. Those who are mutilated or disfigured with wounds, are consoled by the renown which awaits them in the hospital, where everything reminds them of their exploits. It may also be for the benefit of the service more prudent thus to unite than to disperse them. It is a luxury; but it is rational, exemplary, and possesses a character of justice and magnificence.

These establishments being necessarily limited with respect to the number which can be admitted into them, may be considered upon the footing of extraordinary rewards, applicable to distinguished services. They would thus constitute a species of nobility for the soldiers and sailors. They would acquire an additional degree of splendour, were their walls adorned by the trophies taken in war, which would there appear much more appropriately placed, than when deposited in the temples of peace. The decorations of the chapel of *l'Hôtel des Invalides* are admirable. The flags suspended in the cathedral of St. Paul only awaken thoughts at variance with those of religious worship: removed to Chelsea or Greenwich, they would be connected with natural associations, and would furnish a text to the commentaries of those who acquired them by their valour.

It is not often that every desirable quality is seen to be united in one and the same reward: this union, however, frequently takes place in an almost imperceptible manner.

An instance of a reward particularly well adapted to the nature of the service, is that of the monopoly which it is almost universally the custom to create in favour of inventors. From the very nature of the thing, it adapts itself with the utmost nicety to those rules of proportion to which it is most difficult for reward artificially instituted by the legislator to conform. It adapts itself with the utmost nicety to the value of the service. If confined, as it ought to be, to the precise point in which the originality of the invention consists, it is conferred with the least possible waste of expense: it causes a service to be rendered, which without it a man would not have a motive for rendering; and that only by forbidding others from doing that which, were it not for that service, it would not have been possible for them to have done. Even with regard to such inventions (for such there will be) where others, besides him

who possesses himself of the reward, have scent of the invention, it is still of use, by stimulating all parties, and setting them to strive which shall first bring his discovery to bear. With all this it unites every property which can be wished for in a reward. It is variable, equable, commensurable, characteristic, exemplary, frugal, promotive of perseverance, subservient to compensation, popular, and revocable.

CHAPTER XII.

PROCEDURE AS TO REWARDS.

The province of reward is the last asylum of arbitrary power. In the early stages of society, punishments, pardons, and rewards, were equally lavished without measure and without necessity. The infliction of punishment has already in a measure been subject to regulation: at some future time rules will be laid down for the granting of pardons; and last of all, for the bestowment of rewards. If punishment ought not to be inflicted without formal proof of the commission of crime, neither ought reward to be conferred without equally formal proof of desert.

It may be allowed, that in point of importance, the difference between the two cases is great; that punishment inflicted without trial excites universal alarm, whilst reward conferred without desert excites no such feelings. But these considerations only prove that the advantage of formal procedure in the distribution of reward is limited to the prevention of prodigality, and of the other abuses by which the value of reward is diminished.

At Rome, if certain travellers may be believed, it is the custom, when a saint is about to be canonized, to allow an advocate, who in familiar language is called *the advocate of the devil*, to plead against his admission. If this advocate had always been faithful to his client, the calender might not have been so full as at present.* Be this as it may, the idea itself is excellent, and might advantageously be borrowed by politics from religion. *L'Italico valor non è ancor morto:* there are yet some lessons to be learned in the capital of the world.

It is reported of Peter the Great, that when he condescended to pass through every gradation of military rank, from the lowest to the highest in his empire, he took no step without producing regular certificates of his qualifications. We may be allowed to suppose, that even with inferior recommendations to those produced by this great prince, he would have succeeded. There was no *advocate for the devil* to contest the point, and even had there been one, his fidelity would have been doubtful: but had the qualifications of the Czar been as imperfect as, according to the history, they were complete, his submitting to produce them would have offered a noble lesson.

In England, when a *dormant peerage* is claimed by any individual, the *attorney-general* is constituted the advocate for the devil, and charged to examine into and produce everything which can invalidate his title. Wherefore is he not thus employed when it is proposed to create new peers? Why should he not be allowed to urge everything which can be said against the measure? Is it feared that he would be too often successful?†

In the distribution of rewards, were it always necessary publicly to assign the reason for their bestowment, a restraint would be imposed upon princes and their ministers, to which they are unwilling to submit. There formerly existed in Sweden, a custom or positive law, obliging the king to insert in the patent conferring a pension or title, the reason for the grant. In 1774, this custom was abolished by an express law inserted in the Gazette of that court, declaring that the individuals honoured by the bounty of the king should be considered as indebted to his favour alone. Did this monarch think that he stood in need of services which he would not dare publicly to acknowledge?‡

* "Pope Urban VIII. having suffered some ill treatment from a certain noble Roman family, said to his friends, *Questa gente è molto ingrata. Io ho beatificato uno dé loro parenti, che non lo meritava.*"—*Jortin's Miscellanies.*

† If the peers are interested in not suffering the value of their office to be lessened by sharing it with unentitled persons, the public have a more important interest in preventing profusion with respect to this modification of the matter of reward — in preventing the bestowment of a portion of the sovereign power upon persons who have not purchased such a trust by any service. But if merit be not to be regarded, and there be political reasons for preserving this prerogative uncontrouled, the subject assumes another aspect, and its examination here would be out of place.

‡ Extract from the *Courier of the Lower Rhine*, 5th March 1774. — "*Stockholm, 11th February.* — It was formerly the custom, when the king elevated any one to the rank of nobility, or conferred on him the title of baron, to insert in the diploma the circumstances by which he had merited this distinction. But upon a late occasion, when his Majesty ennobled M. de Geer, chamberlain of the court, he requested that the kindness and good pleasure of the king might be inserted in his diploma as the only reason for his elevation. His Majesty not only complied, but directed that the Chancery should thenceforward follow this rule, as was anciently the practice under the sovereigns of the family of Vasa, till the reign of Christina."

I have not seen any of these ancient diplomas of Swedish nobility, and I know not whether the facts they exhibited as the reasons operating upon the sovereign were specific and detailed: but whatever were the nature of this certificate, it

In England, the remuneratory branch of arbitrary power has begun to be pruned. Except in particular cases, the king is not allowed to grant a pension exceeding £300 per annum, without the consent of parliament. Since the passing of the act containing this restriction, the candidates for pensions have been but few.

When M. Necker undertook the administration of the finances in France, the total of the acknowledged pensions, without reckoning the secret gratuities, which were very considerable, amounted to twenty-seven millions of livres. In England, where the national wealth was not less than in France, the pensions did not amount to the tenth part of this sum. It is thus that the difference between a limited and an absolute monarchy may be exhibited, even in figures.

In Ireland, the king, upon his sole authority, in 1783, created an order of knighthood; thus profiting by what remained of the fragments of arbitrary power. No blame was imputed to him for establishing this tax upon honour: had he levied a tax upon property, the nation might not have been so tractable. Those who hoped to share in the new treasure were careful not to raise an outcry against its establishment: those at whose expense this treasure was established, did not understand this piece of finesse; they opened their eyes widely, but comprehended nothing. The measure could not have been better justified by circumstances. Every day the crown found itself stripped of some prerogative, justly or unjustly the subject of envy; it was therefore high time to avail itself of the small number of those, in the exercise of which it was still tolerated. Become independent of Great Britain, the honour of the Irish nation seemed to require a decoration of this kind: for what is a kingdom without an order of knighthood?

To enter into the consideration of the details requisite for the establishment of a system of remuneratory procedure, comes not within the present part of our design: a very slight sketch of the leading principles on which it might be grounded, is the utmost that can here be given. The general idea would of course be taken from the system established in penal and civil cases. Between these systems, the most striking difference would, however, arise from the interest and wishes of the agent whose act might be the subject of investigation, with respect to the publicity of the act. In the one case, the consequences of such his act, in case it were proved, being pernicious to him, all his endeavour would be to keep it concealed: in the other, these consequences being beneficial, his endeavour would be to place it in the most conspicuous light imaginable. In the first case, his endeavours would be to delay the process, and if possible make it void: in the latter, to expedite it, and keep it valid.

The most striking point of coincidence is the occasion there is in both cases for two parties. In the civil branch, there can hardly be a deficiency in this respect; there being commonly two individuals whose interests are opposite, and known and felt to be so. But in the penal branch, in one very large division of it, there is naturally no such opposition; I mean, in that which concerns offences against the public only. Here, therefore, the law has been obliged to create such an opposition, and has accordingly created it by the establishment of a public prosecutor. In the remuneratory branch of procedure, there is a similar absence of natural opposition, and accordingly the grand *desideratum* is the appointment of an officer whose business it should be to contest on the part of the public, the title to whatever reward is proposed to be granted in this way. He might be entitled, for shortness, by some such name as that of Contestor-general. Without a prosecutor-general, in the large and important division of cases above mentioned, there would not, unless by accident — I mean, when an individual is engaged in the task of prosecution by public spirit, or what is much more natural, by private pique — be any suit instituted, any punishment inflicted. For want of a contestor-general, there is not, unless by a similar accident,* any check given to the injustice of unmerited remuneration.

Upon the whole, then, the penal and civil

served as a token of respect to public opinion, and a means of preserving undiminished the value of titles of nobility. This usurpation was scarcely noticed amidst the great revolution which the king had just accomplished. In the career of arbitrary power, there are open conquests and clandestine acquisitions.

* I say by accident: for as in the case of offences against the public merely, accident will sometimes raise up a private prosecutor in the person of a chance individual, so in matters of remunerative procedure, will accident sometimes raise up a contestor in the person of some member of the body by whose appointment the reward is bestowed. This supposes that the reward is to be in the appointment of a body; so that if it be at the appointment of a single person, the chance of contestation is altogether wanting. This chance will of course be the greater, the more numerous that body: but if the body be very small, especially if it be composed without any mixture of different interests and partialities, and its deliberations held in secret, it will amount to nothing. If the business be confined to three, or four, or half-a-dozen, who are intimately connected, the bargain is soon made: "You serve my friend, I serve yours." Even if the assembly be ever so numerous, the chance of contestation is but a precarious one. The task is at any rate an invidious task: he must be a man of more than common public spirit, added to more than common courage, who, unprompted by party jealousy and uncompelled by office, will undertake it: nor

branches of procedure, but particularly the penal, may in all cases serve either as the models, or, if the term may be admitted, as the *anti-models* of the remuneratory branch of procedure

CHAPTER XIII.

REWARDS TO INFORMERS.

THE execution of a law cannot be enforced, unless the violation of it be denounced; the assistance of the informer is therefore altogether as necessary and as meritorious as that of the judge.

We have already had occasion to remark, that with respect to public offences, where no one individual more than another is interested in their prosecution, it has been found necessary to create a sort of magistrate, an accuser-general, to carry on such prosecutions in virtue of his office; but it is indispensably necessary that offences should be denounced to him, before he can begin to act.

In a well-ordered community, it would be the duty of every individual possessing evidence of the commission of a crime, to denounce the criminal to the tribunals; and such individual would be disposed so to do. In most countries, however, men in general are desirous of withdrawing from the performance of this duty. Some refuse to perform it from mistaken notions of pity towards the delinquent; others, because they disapprove of some part of the law; others, from the fear of making enemies; many from indolence; almost all from a disinclination to submit to that loss which would arise from the interruption of their ordinary occupations.

In these countries, therefore, it has been found necessary to offer pecuniary rewards to informers.

So far as my knowledge extends, governments have never been advised to discontinue this practice. It is supported by authority, but it is condemned by public opinion: mercenary informations are considered disgraceful; salaried informers, odious. Hence it results, that the reward offered by the law does not possess all its nominal value; the disgrace attached to the service is a drawback upon its amount. The individual is rewarded by the state, and punished by the moral sanction.

Let us examine the usual objections made against mercenary informations.

1. *It is odious* (it is said) *to profit by the evil we have caused to others.*

This objection is founded upon a feeling of improper commiseration for the offender; since pity towards the guilty is cruelty towards the innocent. The reward paid to the informer has for its object, the service he has performed; in this respect, he is upon a level with the judge who is paid for passing sentence. The informer is a servant of the government, employed in opposing the internal enemies of the state, as the soldier is a servant employed in opposing its external foes.

2. *It introduces into society a system of espionage.*

To the word espionage, a stigma is attached: let us substitute the word *inspection*, which is unconnected with the same prejudices. If this inspection consist in the maintenance of an oppressive system of police, which subjects innocent actions to punishment, which condemns secretly and arbitrarily, it is natural that such a system and its agents should become odious. But if this inspection consist in the maintenance of a system of police, for the preservation of the public tranquillity and the execution of good laws, all its inspectors, and all its guardians, act a useful and salutary part: it is the vicious only who will have reason to complain; it will be formidable to them alone.

3. Pecuniary rewards may induce false witnesses to conspire against the innocent.

If we suppose a public and well-organized system of procedure, in which the innocent are not deprived of any means of defence, the danger resulting from conspiracy will appear but small. Besides the prodigious difficulty of inventing a coherent tale capable of enduring a rigorous examination, there is no comparison between the reward offered by the law, and the risk to which false witnesses are exposed. Mercenary witnesses also are exactly those who excite the greatest distrust in the mind of a judge, and if they are the only witnesses, a suspicion of conspiracy instantly presents itself, and becomes a protection to the accused.

These objections are urged in justification of the prejudice which exists; but the prejudice itself has been produced by other causes; and those causes are specious. The first, with respect to the educated classes of society, is a prejudice drawn from history, especially from that of the Roman emperors. The word informer at once recalls to the mind those detestable miscreants, the horror of all ages, whom even the pencil of Tacitus has failed to cover with all the ignominy they deserve: but these informers were not the executors of the law; they were the executors of the personal and lawless vengeance of the sovereign.

The second and most general cause of this prejudice is founded upon the employment given to informers by religious intolerance. In the ages of ignorance and bigotry, barba-

have instances been wanting when the most numerous and discordant assemblies have concurred unanimously in the vote of rewards, which the majority have been known individually to disapprove.

rous laws having been enacted against those who did not profess the dominant religion, informers were then considered as zealous and orthodox believers; but in proportion to the increase of knowledge, the manners of men have been softened, and these laws having become odious, the informers, without whose services they would have fallen into disuse, partook of the hatred which the laws themselves inspired. It was an injustice in respect to them, but a salutary effect resulted from it, to the classes exposed to oppression.

These cases of tyranny excepted, the prejudice which condemns mercenary informers is an evil. It is a consequence of the inattention of the public to their true interests, and of the general ignorance in matters of legislation. Instead of acting in consonance with the dictates of the principle of utility, people in general have blindly abandoned themselves to the guidance of sympathy and antipathy — of sympathy in favour of those who injure — of antipathy to those who render them essential service. If an informer deserves to be hated, a judge deserves to be abhorred.

This prejudice also partly springs from a confusion of ideas. No distinction is made between the judicial and the private informer; between the man who denounces a crime in a court of justice, and he who secretly insinuates accusations against his enemies; between the man who affords to the accused an opportunity of defending himself, and he who imposes the condition of silence with respect to his perfidious reports. Clandestine accusations are justly considered as the bane of society: they destroy confidence, and produce irremediable evils; but they have nothing in common with judicial accusations.

It is extremely difficult to eradicate prejudices so deeply rooted and natural. From necessity, the practice of paying public informers continues to be in use; but the character of an informer is still regarded as disgraceful, and by some strange fatality the judges make no efforts to enlighten the public mind on this subject, and to protect this useful and even necessary class of men from the rigour of public opinion. They ought not to suffer the eloquence of the bar to insult before their faces these necessary assistants in the administration of justice. The conduct of the English law towards informers furnishes a curious but deplorable instance of human frailty. It employs them, oftentimes deceives them, and always holds them up to contempt.

It is time for lawgivers at least to wean themselves from these schoolboy prejudices, which can consist only with a gross inattention to the interests of the public, joined to a gross ignorance of the principles of human nature. They should settle with themselves once for all what it is they would have: they should strike, somehow or other, a balance between the benefit expected from the effects of a law, and the inconveniences, or supposed inconveniences, inseparable from its execution. If the inconveniences preponderate, let there be an end of the law; if the benefits, let there be an end of all obstacles which an aversion to the necessary instruments on which its efficacy depends, would oppose to its execution.

CHAPTER XIV.

REWARDS TO ACCOMPLICES.

Among informers, criminals who denounce their accomplices have been distinguished from others, and the offer of pardon or rewards to induce them thus to act, has been condemned as altogether improper. It must be acknowledged, that so long as there is any other means of obtaining the conviction of a criminal without thus rewarding an accomplice, this method is bad; the impunity necessarily accompanying it is an evil. But if there be no other means, this method is good; since the impunity of a single criminal is a less evil than the impunity of many.

In relation, however, to weighty and serious crimes, no such rewards can with propriety be appointed by a general law. A general law offering pardon and reward to the criminal who informed against his accomplices, would be an invitation to the commission of all sorts of crimes: it would be as though the legislator had said, "Among a multitude of criminals, the most wicked shall not only be unpunished but rewarded." A man shall lay plans for the commission of a crime — shall engage accomplices with the intention of betraying them: to the natural profits of the crime, such a law would add the reward bestowed upon him as an informer. It is what has often happened under English law. It is one of the fruits of the maxim which prohibits the examination of suspected persons, respecting facts which may tend to criminate themselves. It is, however, criminals who *can always* furnish, and who *often can alone* furnish, the light necessary for the guidance of justice. But the examination of suspected persons being forbidden as a means of obtaining intelligence, there remains only the method of reward.

But when the reward, instead of being bestowed in virtue of a general law, is left to the discretion of the judge, and offered only when necessary, this inconvenience does not exist. Advantageous crimes can no longer be committed with security. Recourse being had to this costly method only when all other methods fail, there will always be a longer or shorter interval, during which every cri-

minal will feel himself exposed to the punishment denounced against his crimes. The employment of reward in this manner having become usual, will exercise upon the security of criminals the effect of a general law: it might even be prescribed by such a law. This method would then possess all the advantages of an unconditional law, without its inconveniences.

Beccaria has condemned, without exception, every reward offered to accomplices. As the foundation of his opinion, he produces only a confused sentiment of disapprobation attached to the words "*treason* and *faithlessness*."

Voluntary conventions among men are generally useful to society. It would be in most cases productive of evil, were they not considered binding. Infamy has therefore become constantly attached to the terms *treason* and *faithlessness*. The acts, however, to which these terms are applied, are only pernicious in as far as the contracts of which they are violations are at least innocent. To render the security of society (which crimes, were they to remain unpunished, would destroy) subordinate to the accomplishment of all manner of engagements, would be to render the end subordinate to the means. What would become of society, were it once established as a principle, that the commission of a crime became a duty if once it had been promised? That promises ought to be performed, is a maxim which, without a limitation excepting those the performance of which would be pernicious to society, ought to have place neither in laws nor in morals. It is doubtful which would be most injurious — the non-performance of every promise, or the performance of all. Far from being a greater evil than that to which it is opposed, it would be difficult to show that the non-performance of criminal engagements is productive of any evil. From the performance of such an engagement, an unfavourable judgment only can be formed of the character of the party: how can a similar judgment be formed from its violation? Because he has repented of having committed or been willing to commit an action injurious to society, and which he knew to be so, does it follow that he will fail to perform actions which he knows to be innocent and useful?

From the violation of engagements among criminals, what evil can be apprehended? — That unanimity shall be wanting among them? — that their enterprises shall be unsuccessful? — that their associations shall be dissolved? It is proverbially said, "there is honour among theives." The honour which cements their conspiracies is the pest of society. Why should we not seek to inspire them with the highest degree of distrust toward each other? — why should we not arm them against each other, and make them fear lest they should find an informer in every accomplice? Wherefore should we not seek to fill them with a desire to inform against and mutually to destroy each other; so that each one, uneasy and trembling in the midst of his fellows, should fear his companions as much as his judges, nor be able to hope for security but in the renunciation of his crimes? This is exactly what the consideration of the public welfare would lead us to wish; and if we are to be turned aside from the care of this object by regard to the fidelity of thieves and murderers to their engagements, for a still stronger reason, from humanity, ought we to abstain from punishing their crimes.

Beccaria, upon just ground, condemns the sovereigns and judges, who after having enticed an offender to become an informer, afterwards violate their promise, and render it illusory. In this case we need not fear to give vent to the feelings of horror and indignation which so mischievous a proceeding inspires. It is mischievous in the highest possible degree. It destroys all future confidence in similar offers, and renders powerless this most necessary instrument. It cements, instead of weakening, the union of criminals among themselves; and causes government itself to appear as the guardian of their society, by adding mockery to the rigour of the law, by punishing the individual who has confided in its promises.

"But," says Beccaria, "*society authorizes treason, detested even by criminals among themselves.*" We have already seen what is to be understood by this treason. It is natural to criminals to detest it — it is their ruin: it ought to be approved by honest men — it is their safeguard. *It will introduce crimes of cowardice and baseness.* No: it will introduce acts of prudence, of penitence, and of public utility; it will operate as an antidote to all crimes. *These pretended crimes of cowardice are more injurious to a nation than the crimes of courage.* The truth is exactly the reverse: which produce most alarm in society, privately stealing and swindling on the one side, or highway robbery and murder on the other? *The tribunal which employs this expedient, discovers its uncertainty.* It discovers that it can know nothing without having learnt it. By what means can a judge attain to certainty without witnesses? In what country is it customary for criminals to make the judges the confidants of their misdeeds and their plans? *The law exhibits its feebleness, in imploring the assistance even of him who has broken it.* The law seeks the offender who flies from it: if the means employed for his discovery are effectual, it only exhibits its wisdom

But if rewards are to be bestowed upon criminals who denounce their accomplices, Beccaria desires that it may be in virtue of

"a general law, which should promise impunity to every accomplice who discovers a crime, rather than by a particular declaration in each particular case." The reason he assigns is, that "such a law would prevent the combination of malefactors, by inspiring each of them with the fear of exposing himself alone, to danger, and that it would not serve to give that boldness to the wicked, who see that there are some cases in which their services are required." But we have already observed, that the particular declaration equally serves to prevent this combination, and that it is the general law which tends to give boldness to the wicked, and even creates the belief that justice cannot be executed without them.

"A law of this nature," adds Beccaria, "ought to join to impunity the banishment of the informer." A condition of this nature could only serve to render the law inefficacious in a variety of cases, and also contains a contradiction in terms. A law joining banishment to impunity! Is not banishment a punishment?*

CHAPTER XV.

COMPETITION AS TO REWARDS.

WHEN a portion of the matter of reward is allotted for the purchase of services, ought the liberty of competition to be admitted? — in any, and what cases? — what is the general rule, and what are the exceptions? — in the case of what species of service? — for what species of reward?

If popular opinion be allowed to determine, the question concerning the general rule is already answered. In all cases in which no particular reason can be given to the contrary the liberty of competition ought to be admitted upon the largest scale. Yet to this decision of the public, the practice of nations, that is, of those who bear the sway in nations, is by no means uniformly conformable: there are privileges and there are exclusions — pursuits open to one set, closed to another set of men: all governments have been more or less infected with that intermeddling disposition, which believes it can give perfection to particular species of service, by appropriating its exercise exclusively to particular individuals.

That there may be cases fit to be excepted out of the above general rule, is allowed: but before we come to the consideration of the exceptions, let us see how the matter stands upon principle — whether the people are most right, or their rulers.

And in the first place, by way of illustration, let us stop a moment to examine the connexion there is upon this occasion between reward and punishment. Let us suppose, apprehensions are entertained of the prevalence of murder and incendiarism. Against a particular person the suspicions are stronger than against any one else. There is as yet no law against either of those offences. The sovereign, intending to do his utmost to guard the state against those calamities, sends for the suspected person, and prohibits him from committing any such crimes, under such penalties as he thinks proper: for the suspected person, observe, and for him only; there being as yet no general law prohibiting such enormities, and everybody else being left at perfect liberty. If it were possible that any such incident could have happened within time of history, should not we pronounce at once, that either the nation could not yet have emerged from a state of the profoundest barbarism, or else that the sovereign so acting could not have been in his right mind? Such, however, is the exact counterpart of the policy of him, who wanting a service to be performed of such a nature as that, for aught he can be certain, there are several competent to perform it — some better than others, and each man, according to the motives that are given him, better than himself — commits the business to one, in exclusion of the rest.

If penal laws must be applicable to all, that there may be a chance of preventing all offences, the offer of reward ought to be general, that there may be a chance of obtaining all services, and of obtaining the best.

If we inquire in detail for the reasons why competition for reward, and for everything else which can be bestowed in the way of producing service, should be as open and as free as possible, the question may be considered in two points of view: — first as it

* To the edition of Beccaria published at Paris in 1797, are added some notes by Diderot: unfortunately, they are short and few. I translate those which relate to the present chapter: —

"The errors of courts of justice and the feebleness of the law, even when crimes are known to have been committed, are matters of public notoriety. It is in vain to endeavour to conceal them; there is nothing, therefore, to counterbalance the advantage of disseminating distrust among malefactors, and rendering them suspected and formidable to one another, and the causing them without ceasing to dread in their accomplices so many accusers. This can only tend to make the wicked cowards, and everything which renders them less daring is useful."

"The delicacy of the author exhibits a noble and generous heart: but human morality, of which laws form the basis, is directed to the maintenance of public order, and cannot admit among the number of its virtues the fidelity of malefactors among themselves, that they may disturb that order, and violate the laws with greater security. In open war, deserters are received: with greater reason ought they to be received in a war carried on amidst silence and darkness, and whose operations consist of snares and treachery."

concerns the interests of those for whose sake the service wanted is to be performed; secondly, as it concerns the interests of those by whom the service might come to be performed.

With regard to the former set of interests, it has already been observed,* as a reason for the employment of reward as a fitter instrument than punishment for attaining a given degree of excellence, the idea of which has already been conceived by the person who wishes it to be attained, — that the chance is greater when reward is employed as the incitement, than when use is made of punishment; because punishment can only operate upon a few selected individuals, and should they be unequal to the task, would be altogether employed in vain. Whatever number you select, you forego all the chance which you might have of the service being performed by any one else. The case is equally the same when rewards are offered to a selected few. Allowing the liberty of competition, you may propose rewards to any number without expense — you pay it but to one: you do not pay it till the service is performed; and the chance of its being performed is in proportion to the number of persons to whom it is proposed.

Another advantage which reward has over punishment, as we have seen, is, that by means of the former, the value of the service may be brought to an indefinitely high degree of perfection. But this can only be effected by means of a free competition. In this way, and this only, can individuals be led to exert their faculties. Were the reward proposed to one only, having rendered the degree of service sufficient to entitle him to the reward, he would stop there: to make the exertions necessary to carry it to any higher degree of perfection, would be to trouble himself to no purpose. But let a reward be offered to that one of two competitors, for example, who best performs the service: unless either of them know exactly the degree of skill possessed by the other, and know it to be clearly inferior to his own, each will exert himself to his utmost, since the more perfect he makes his work, the better chance has he of gaining the reward. The matter is so ordered, that for every part of the greatest degree of service he can possibly find means to render, there will be a motive to induce him to render it. The same reasoning may be applied to any other number of competitors; and the chance of perfection will be increased, if the faculties of the competitors are equal in proportion to their number.

Should he who has the disposal of the reward assert — "I am acquainted with an individual more competent than any other to perform the service in question, and with whom no one can be placed in competition," — his assertion is exposed to this dilemma: Upon a fair trial of skill, either this person will stand first, or he will not: if he stand first, the competition is not to his prejudice, but redounds to his honour; if another excel him, the advantage of a free competition is proved. Partiality is either mischievous or unnecessary.

We next consider the question as it affects the interest of those who might be admitted as competitors.

Reward in its own nature *is a good:* all competitors think so, and that a balance of good remains even after deducting the evil of that labour, whatever it be, which is expended in the performance of the service, or they would not be competitors. He who has the disposal of the reward thinks so, or he would neither offer it, nor be so anxious as he sometimes is to secure it for those to whom he wishes to give a preference. But when there is no special reason to the contrary, why should not all the members of a state have a chance of obtaining the goods to be distributed in that state? To exclude any man from any chance he might have of bettering himself, is at best a hardship: if no special reason can be given for it, it is injustice, and one of those species of injustice which, if administered on pretence of delinquency, would openly bear the name of punishment.

It may be objected, that if a free competition were allowed, "the number of competitors would be very great, while the reward being confined to one, or to a very small number, one only will be paid for his labour; the lot of the rest would be lost labour and disappointment: that the public would be losers, by their labours being diverted from services of greater utility, and that the service would, without this competition, be performed in a sufficient degree of perfection, or if performed in any higher degree, would be of no further use."

The following considerations may serve as a reply to these objections. Where there is nothing more than the mere loss of labour to those who can afford to lose it, or of any thing else to those who can afford to part with it, the possible amount of mischief, be it what it may, can afford no sufficient reason for narrowing competition. If there be the pain of disappointment after trial, there has been the pleasure of expectation before trial; and the latter, there is reason to believe, is upon an average much greater than the former. The pleasure is of longer continuance, it fills a larger space in the mind; and the larger, the longer it continues. The pain of disappointment comes on in a moment, and gives place to the first dawning of a new hope, or is driven out by other cares. If it be true, that the principal part of happiness consists in hope, and that but few of our

* Book I. Chap. VII. *antea*, p. 204.

hopes are completely realized, it would be necessary, that men might be saved from disappointment, to shut them out from joy.

It may further be observed, that the liberty of competition seldom includes so many as, if considered with regard to the particular nature of the service, it would seem to include. Where it is not restrained by institution, it is often restrained by nature, and that sometimes within very narrow bounds. Services depending on opportunity, are confined to those to whom fortune shall have given the opportunity; — services depending on science or on art, are confined to those whom education and practice have familiarized with the science or the art; — services depending on station, are confined to one, or to the few, if there be more than one, who at the time in question are invested with that station. Thus the objection derived from the too great number of competitors is almost always without foundation.

It also often happens, that, independently of the reward given to the successful candidate, the service even of the unsuccessful pays itself. This is more particularly apt to be the case with regard to services of indefinite excellence which depend on skill. Some develope their talents — others obtain notoriety; one discourse obtains the reward — twenty candidates have improved their minds in endeavouring to obtain it. The athletic exercises, which on such a vast variety of occasions were celebrated throughout ancient Greece, to have been open to all comers: it was but one at each game that could obtain the prize; but even the unsuccessful combatants found a sort of subordinate advantage in the reputation of having contended, and in the advances made by them in those energies, which at that time of day gave distinguished lustre to every one who excelled in them.

It may even happen, that the service of the successful shall be no object, and that the services looked to on the part of him who institutes the reward shall be those which are performed by the unsuccessful. The Grecian games just mentioned, may be taken as an example. The strength of the successful combatant was no sensible advantage to the country: the object aimed at was the encouragement of personal prowess and skill. In this country, the prizes given at horse-races have a similar sort of object. From the few horses who win, the public may reap no particular advantage; but the horses which are beaten, or never contend for the prize, are improved by the emulation to which it has given birth.

By the English Government, very ample rewards are offered to him who shall discover the most perfect and practicable mode of ascertaining a ship's longitude at sea. One effect of this reward is to divert from their employments a multitude of artists and students in various branches of physical science, of whom a few only can have any recompense for their expense and labour. To pay all that would try, might probably be impracticable; but the benefit of the service appears to counterbalance this inconvenience; and in point of fact, the persons who can suppose themselves qualified to contend in such a race are so few, that this inconvenience can scarcely be very considerable. Were the same reward to be given for running, boxing, or wrestling, the common businesses of life would be deserted, and all the world would become runners, boxers, and wrestlers.

Amongst the Athenians, rewards not vastly inferior, considering the difference in the value of money and the common rate of living, were actually given to such athletic exercises. But the Athenians were as much in the right so to do, as we should be in the wrong to imitate them. In those days, when success in war depended almost entirely upon bodily address and vigour, encouraging the performance of these exercises was disciplining an army; and the national wealth could suffer little, since the labours of agriculture were chiefly carried on by slaves.

The advantages resulting from the most unlimited freedom of competition therefore are — 1. Chance of success increased according to the number of competitors; 2. Chance of the highest success increased by invigorating the increased effort of each competitor; 3. Equality established; 4. Number of works multiplied; 5. Latent talents developed.

Application of the above principle.

The cases to which this principle may be applied are much more extensive than might at first view be imagined: it covers a great part of the field of legislation; it may be applied to ecclesiastical, to fiscal, to administrative, and to constitutional laws.

This rule is in direct opposition to the fundamental principle of Hindoo legislation. In that country, every man belongs to a caste from which he cannot separate himself. To each caste belongs the exercise of certain professions: there is a caste of learned men, a caste of warriors, and a caste of labourers. Emulation is thus reduced within the narrowest bounds, and the energies of the people are stifled.

This principle is opposed to those ecclesiastical regulations, by which all who refuse to sign certain articles of belief, or refuse to pronounce a certain number of words concerning theological subjects, are excluded from certain professions. The greater the number of individuals thus excluded, the greater the loss sustained by the diminution of competition in the performance of those services.

This principle is in direct contradiction to

a multitude of fiscal and administrative laws, establishing exclusive privileges in favour of certain branches of commerce and trade; fixing the price of commodities, and the places at which they are to be bought and sold; prohibiting the entry or the exit of various productions of agriculture or of manufactures. These are so many expedients limiting competition, and are injurious to the national wealth.

The father of political economy has from this principle in a manner created a new science: the application he has made of it to the laws relating to trade, has nearly exhausted the subject.*

By two opposite competitions, prices are fixed. Competition among the purchasers secures to the producers a sufficient compensation for the outlay of their capital and labour: competition among the sellers, serving as a counterpoise to the other, produces a cheap market, and reduces the prices of commodities to the lowest sum for which it is worth while to produce them. The difference between a low price and a high price is a reward offered to the purchaser by one seller for the service he will render to him, by granting what remains to be gained, to him instead of to his competitor who requires more.

In all trades, and in all arts, competition secures to the public, not only the lowest price but the best work. Whatever degree of superiority is possessed by one commodity over another of the same description, meets with its reward either in the quantity sold, or in the price at which it is sold.

As to stores of every description of which the public stands in need, why is not the competition left open to all who may choose to undertake the supply? It is not difficult to find the determining reason: it is more convenient to serve a friend, a dependent, or a partizan, than a person unknown, or perhaps an enemy. But this is not an avowable reason: for the public, some other must be sought. Open competition would, it is said, produce a multitude of rash contractors. The terms in appearance most advantageous to government would commonly be offered by some rash adventurer, who, in the end, would be found unable to fulfil his engagements. When the time came for the performance of his part of the contract, the stores in question would not be provided, and the service would suffer irreparable injury. It is important that the men with whom we deal should be well known. In some cases, these reasons may not be without foundation, but they are most frequently illusory.†

The very nature of the reward may sometimes render it necessary to depart from the system of competition. It is not every office that can be offered to every one disposed to undertake it. Ought the education of a prince to be offered to him who writes the best treatise upon that education? No: such an office requires qualities and virtues, and particularly a knowledge of the world, which might not be possessed by the philosopher who had resolved the problem.

Ought the office of master of the mint to be offered to any one who produces the best die? No: this important duty requires a probity, an exactness, a habit of regularity, which has no connexion with manual skill. This is a reason, and the only reason, for not offering such offices to all the world; but it is no reason for not attaching to this service another reward, to which all the world might aspire.

Some services, which are not directly susceptible of open competition, are so indirectly; that is, by making the competition consist in the performance of some preliminary service, the execution of which may serve as a test of a man's ability to perform the principal service. This is what is done in the case of extensive architectural works, when artists are invited to give in their plans and their models: this is all that the nature of the service allows of.‡

* Wealth of Nations.

† The following is the general outline of an arrangement by which all the above difficulties would be effectually removed:—Unlimited competition; with power to the minister, or to any competent authority, to reject the offer which ought according to the general rule to be accepted: power also to the offerer to call upon the minister, or competent authority, to assign their reasons for such rejection. When all this is done publicly, no attempt would be made to reject the offer of a man, who, together with his sureties, was known to be perfectly responsible.

A praise to which one of the most *celebrated* ministers in England is justly entitled, and about which there is no difference of opinion, is the having, with more consistency than any of his predecessors, followed this principle. Mr. Pitt divested himself of this source of influence, so dear to ministers, and opened a free competition for all contracts and all loans. It is unnecessary to point out the advantages resulting from this just and liberal policy: they are known to all the world; and the example set by him has been a law to his successors.

‡ Some years ago, it was thought desirable to have a general Index made to the Journals of the House of Commons: for if it be not yet desirable to have the laws themselves methodised, it has however been thought desirable to methodise the history of the proceedings of this branch of the legislature. It was an undertaking of very considerable difficulty, both in consideration of its magnitude, and the variety of matter it embraced. How were fit persons to be selected for it? Competition, in the usual mode, could not have been employed. The legislature could not say to men of letters,—Work, and the best workman shall be rewarded. Who, uncertain of being paid for .., would have devoted his life to so repulsive an employment? The course taken was this:—the work was put into the hands of four men of letters, selected one knows not how, nor by whom, nor why. The work was divided amongst them, in such sort that each of them received to his

When, some years ago, it was designed to erect, in the neighbourhood of London, at the public expense, a Penitentiary House, the mode of unlimited competition was adopted, in order to obtain plans for it. The superintendents received sixty-five plans, from among which they had an opportunity of making a selection, instead of the one which they would have received, had the system of favouritism been pursued. If, without reward, a plan superior to the best of those thus obtained has since been devised, it may be attributed to the share which chance has in every new invention: the offer of a reward may accelerate the developement of new ideas, without enabling an individual to complete the arrangement of his plans at a given moment.

When the British parliament offered a reward of £20,000 for the discovery of a mode of finding the longitude, they were not guilty of the absurdity of confining the competition to the professors of natural philosophy and astronomy at Oxford and Cambridge. To resolve the problem of the best system of legislation, is more important and more difficult. Why, in mixed governments, has it been hitherto confined to the members of the legislative body, and in monarchies, to the chancellor? The determining reason is abundantly clear: Those who are in possession of the power — those to whom it belongs to propose this problem, are ashamed to make a public avowal of their own incapacity to solve it; they carefully avoid all acknowledgments of their own incapacity or indolence; they are willing that their labours should be rendered as little burdensome as possible, by following the ordinary routine, and not that they should be increased by the exhibition of the necessity of reform. In a word, they desire not to be advised, but to be obeyed. While subject to the influence of such circumstances, it can be considered no matter of surprise that they should, as far as possible, have made the science of legislation an exclusive monopoly. The interests of human nature cry aloud against this contemptible jealousy. The problem of the best system of laws ought to be proposed to the whole world: it belongs to the whole world to solve it.

Frederic the Great twice attempted to make a general reform in the laws of his kingdom: both times he applied to a single chancellor. The first of them, too contented with himself to suspect he could stand in need of assistance from others, produced a work the most insignificant of any which has appeared.* The second, M. Von Carmer, after having completed his labours, acted very differently, and much better: before it received the authority of a law, he presented it to the public, with an invitation to learned men to communicate to him their observations upon it; seconding his invitations by the offer of rewards. It is with regret that I am constrained to ask, why did not he, who had in this respect thus far surpassed all his predecessors, act still more nobly? Why only ask for criticism upon a given work? — why not ask for the work itself? Why limit the invitation to Germans alone, as though there were no genius out of Germany? — why limit the reward to a sum below the price of those snuff-boxes which are presented to a foreign minister, for the service he performs in departing when he is recalled. The richest diamond in his master's crown would not have been too great a reward for him who should thus have given to all the others a new and before-unknown splendour.

On different occasions, public-spirited individuals and societies have endeavoured to supply, from their slender resources, the neglect of governments, and have offered larger rewards than the chancellor of the Great Frederic. That which they could not offer, and which it did not depend upon them to offer, was the reward which the minds best adapted for the accomplishment of such an undertaking would esteem above every other: I mean, the assurance that their labours would be judged by those who could give them authority — who could make them useful.

In conclusion, I do not say, that with regard to certain services, sufficient reasons may not be found for altogether excluding competition, but that in every such case these reasons ought to be ready to be rendered, otherwise it ought to be lawful to conclude that they do not exist.†

share such and so many volumes, according as he was most in favour. The result has been four indexes instead of one, all of them materially varying in method and completeness, and rendering unavoidable the great inconvenience of consulting four volumes instead of one. If a plan analogous to that employed in the case of architectural works had been adopted, the course taken would have been to advertise a premium for the best essay on the art of index-making, and particularly as applied to the work in question. As a still further security, an index to one volume might have been required by way of specimen; and to him who gave the greatest satisfaction upon both these points, the conduct of the work should have been committed.

* Some extracts from it may be seen in the *Manual of Political Economy*.

† With reference to constitutional law, hereditary succession to the throne is established, to prevent the competition of many pretenders. It is the principal exception to the principle, and the most easily justified.

Another species of inheritance, of which the Egyptians had given an example, and which the Indians have adopted, has found admirers even in our days. I refer to hereditary professions in particular families, where they can neither have two, nor change their first. "Par ce moyen," says Bossuet, "tous les arts venaient à leur perfection: on faisait mieux ce qu'on avait toujours vu faire, et à quoi l'on s'était uniquement exercé dès son enfance."—*Discours sur l'Histoire Universelle.*

CHAPTER XVI.

REWARDS FOR VIRTUE.

Beccaria accuses modern legislators of indifference to this subject. "Punishments," says he, "and, in many instances, unduly severe punishments, are provided for crimes; for virtue there are no rewards." These complaints, repeated by a multitude of writers, are matter of common-place declamation.

So long as they are confined to general terms, the subject presents no difficulty; — but when an attempt is made to remove the ground of complaint, and to frame a code of remuneratory laws for virtue, how great is the difference between what has been asserted to be desirable, and what is possible!

Virtue is sometimes considered as an act, sometimes as a disposition: when it is exhibited by a positive act, it confers a service; when it is considered as a disposition, it is a chance of services. Apart from this notion of service, it is impossible to tell wherein virtue consists. To form clear ideas concerning it, it must altogether be referred to the principle of utility: utility is its *object*, as well as its *motive*.

After having thus far spoken of *services* to be rewarded — that is, of manifest and public acts which fall not within the line of ordinary actions — it remains to be shown, in relation to *virtue*, — 1. What cannot be accomplished by general rewards; 2. What it is possible to accomplish, either by particular institution, or occasional reward.*

1. We may observe, in the first place, that those civil virtues, which are most important to the welfare of society, and to the preservation of the human race, do not consist in striking exploits, which carry their own proof with them, but in a train of daily actions, in an uniform and steady course of conduct, resulting from the habitual disposition of the mind. Hence it is precisely because these virtues are connected with the whole course of our existence, that they are incapable of being made the objects of the rewards of institution. It is impossible to know what particular fact to select, at what period to require the proof, to what particular circumstance to attach the distinction of reward.

2. Add to these difficulties, that of finding a suitable reward which shall be agreeable to those for whom it is designed. The modesty and delicacy of virtue would be wounded by the formalities necessary to the public proof of its existence. It is fostered by, and perhaps depends upon esteem: but this is a secret which it seeks to hide from itself, and those prizes for virtue which seem to suppose that conscience is bankrupt, would not be accepted by the rich, nor even sought after by the most worthy among the poor.

3. Every virtue produces advantages which are peculiar to itself: probity inspires confidence in all the relations of life; industry leads on to independence and wealth; benevolence is the source of kindly affections; — and though these advantages are not always reaped, they generally follow in the natural course of events. Their effect is much more steady and certain than that of factitious reward, which is necessarily subject to many imperfections.

In the reign of Louis XIV. a treatise was published — "On the *Falsity* of Human Virtues." What is singular, and what the author probably never suspected is, that by some slight alterations it would be easy to convert this work into a treatise *on their reality*. The author appears to have considered them as false, because they were founded upon reciprocal interest — because their object is happiness, esteem, security, and the peaceable enjoyment of life — because men in their mutual intercourse settle with each other for their reciprocal services. But without these felicitous effects, what would virtue be? In what consists its *reality*? What would it have to recommend it? How would it be distinguished from vice? This basis of interest, which to this author appears to have rendered it *false*, is precisely that which gives it a true and solid, and we may add, an immutable existence; for no other source of happiness can be imagined.†

But if the most important class of virtues are already provided with sufficient motives to lead to their performance, either in the sufferings they prevent, or in the advantages to which they give birth, is it not superfluous to add factitious motives? The interference

Robertson, in his *Historical Researches respecting India*, has warmly approved the institution of castes, and hereditary professions. He allows, however, that this system may hinder the exertions of genius. "But the arrangements of civil government," says he, "are made, not for what is extraordinary, but for what is common; not for the few, but for the many."—*Appendix.*

If we look at a single art in Europe — that of painting, for instance—its history will show, that very few artists have been born in a painting room. Among a hundred of the most celebrated painters, it will be found that Raphael alone had a father who handled the pencil. "*Invito patre sidera verso*," was the device of the illustrious Bernouilli, who could only study astronomy in secret, and in opposition to the authority of his father. — *Dumont.*

* This will partly form an application of the principles laid down in Chapter VII. *Punition and Remuneration — their relations.* Mr. Bentham, apparently not having believed it necessary to enter into this detail, I have attempted, by this chapter, to supply this omission, if it were one.— *Note by Dumont.*

† The writer above alluded to, like all ascetics unskilful in reasoning, injures the religion it was his object to serve. How strong an argument may we not derive from this coincidence between practical morality and happiness, in proof of design on the part of the supreme legislator!

of legislators is useful only in supplying the deficiency of natural motives.

4. What would be our condition were things in a different state? — were it necessary to invite men to labour, honesty, benevolence, and all the duties of their several conditions, by means of factitious reward? Pecuniary rewards, it is evident, it would be impossible to bestow. Honour, it is true, remains; but how would it be practicable to create, in the shape of honour, a sufficient fund of reward for the generality of human actions? The value of these rewards consists in their rarity: so soon as they are common, their value is gone.

In this case, as in so many other cases, there is an analogy between rewards and punishments. It is an imperfection common to both these sanctions, that they are applicable to actions alone, and exercise only a distant and indirect influence upon the habits and dispositions which give a colour to the whole course of life. Thus, rewards cannot be instituted for parental kindness, conjugal fidelity, adherence to promises, veracity, gratitude, and pity: legal punishments cannot be assigned to ingratitude, hardness of heart, violations of friendly confidence, malice or envy, — in a word, to all those vicious dispositions which produce so much evil before they have broken out into those crimes which are cognizable before legal tribunals. The two systems are like imperfect scales, useful only for weighing bulky commodities; and as an individual, whose life has been less guilty than that of a man of a hard and false heart, is punished for a single theft, there is also often a necessity of rewarding a certain distinguished service, performed by a man who is otherwise little entitled to esteem.

Thus, in regard to the moral virtues which constitute the basis of daily conduct, there is no reward which can be applied to them by general institution. All that it is possible to do is limited to seizing upon those striking actions, readily susceptible of proof, which arise out of extraordinary circumstances, as opportunities of conferring occasional rewards.

Rewards of this nature cannot be bestowed periodically: the occasions for performing eminent services do not regularly recur. It is the action, and not the date in the almanack, which ought to occasion the reward. The French Academy annually bestowed a prize upon the individual who, among the indigent classes, had performed the most virtuous action. The judges had always one prize to bestow, and they had but one. They must occasionally have experienced regret at leaving unrewarded actions of merit equal to that which gained the reward, and sometimes at being obliged to reward an action of an ordinary description. Besides, by the periodical return of the distribution, this prize would soon be rendered an object of routine, and cease to attract attention.

The institution of *La Rosière de Salency* may be produced in answer to the above observations: but it should be remembered, that a village institution is of a different nature. The more limited a society, the more closely may its regulations be made to resemble those of domestic government; — in which, as we have already seen, reward may be applied to almost every purpose. It is thus that annual prizes may be established for agility, skill, strength — for every other quality which it may be desirable to encourage, and of which the rudiments always exist. There is not a village in Switzerland which does not distribute prizes of this nature for military exercises: it is an expedient for converting the duties and services of the citizens into *fêtes*. Geneva, whilst it was a republic, had its naval king — its king of the arquebuss — its commander of the bow — its king of the cannon. The conqueror, during the year of his reign, enjoyed certain privileges, little costly to the state; the public joy marked the return of these national exercises, which placed all the citizens under the eyes of their grateful country. *La Rosière de Salency*, designed to honour virtues which ought to be perpetuated and renewed from generation to generation, might have a periodical return, like the roses of summer.

The *Humane Society*, established in England for the purpose of affording assistance to persons in danger of drowning, and providing the means of restoration in cases of suspended animation, distributes prizes to those who have saved any individual from death. In this case, the reward is not, as in the French Academy, confined to the indigent class alone: men of the first rank would consider it an honour to receive a medal commemorative of so noble an action. Besides, the mode of conferring these rewards has not been dramatised; the retired habits of virtue have been consulted; there is no public exhibition to which it is dragged, to be confounded or humiliated. Greater *eclat* might, however, without adding to the theatrical effect, be given to these rewards, were an efficient report made of them to the king and both houses of parliament.

An institution of a similar nature, for the reward of services rendered in cases of fire, shipwreck, and all other possible accidents, would still further contribute to the cultivation of benevolence; and these noble actions, brought in the same manner under the eyes of the legislators, and inscribed in their journals, would acquire a publicity of much less importance to the honoured individual than to society in general.

Indeed, though the reward applies only to one particular action, the principal object designed is the cultivation of those dispositions which such actions indicate: and this can only be accomplished by the publicity

which is given to the example, and the public esteem and honour in which it is held.

When, upon the site of the prison which had been the scene of an exalted instance of filial piety, the Romans erected a temple, they inculcated a noble lesson: they proclaimed their respect for one of the fundamental virtues of their republic.*

Independently of these eminently meritorious and always rare actions, governments might render *publicity* subservient to the perfection of a great variety of services, in the performance of which the regular discharge of duty is more important than the display of extraordinary virtues. This project might be realized by the formation of a comparative table of the subordinate administrations of cities, parishes, or counties. This table would require to be renewed at fixed periods, and might be made to show which districts were most exact in the payment of taxes — in which the fewest crimes had been committed — in which useful establishments had been formed — in which the most liberal exertions had been made for the relief of calamity — what hospitals had been conducted with the greatest economy, and had been most successful in the cure of diseases; † what tribunals had decided the greatest number of causes, and from which the smallest number of appeals had been made; in what instances efficacious precautions had been adopted for relieving any particular district from causes tending to render it unhealthy, — from mendicity, from smuggling, from vice, and from misery.

Such official reports, independently of their political utility to the government, would, without parade, produce all the good effects of reward — of that reward in honour which costs nothing to the country, and yet maintains all the moral energies in full activity. Every distinguished service might find a place in these annals; and the people, always prone to exaggerate the vigilance and means of information possessed by their governors, would soon be persuaded that a perpetual inspection was kept up, not only with respect to their faults, but also their meritorious actions.

This project is borrowed neither from the Republic of Plato, nor the Utopia of More. It is even inferior to what has in our time been carried into effect, in an empire composed of more than a hundred departments; ‡ in which tables, exhibiting in columns all the results of civil, economical, rural, and commercial administration, were formed with greater facility and promptitude than would have been experienced by any Russian noble, had he been desirous of obtaining from his superintendents an account of the state of his property.

If rewards were established for virtue, when exhibited by the indigent classes, it would be improper to seek for striking instances of its display, or to suppose that they are actuated by sentiments of vanity, which operate feebly upon men accustomed to dependence, and almost constantly employed in making provision for their daily wants. Institutions of this nature, suited to small communities, ought to be adapted to local circumstances and popular habits. In a village or a town, for instance, it might be proper to assign a distinguished place in the church for the old men: this distinction, united to a sentiment of religion, and granted with discretion, need bear no appearance of flattery, but might be a mark of respect towards old age, rendered honourable by the blameless life which had preceded it. There exist in England many charitable institutions for decayed tradesmen, in which their situation is much preferable to that of the inhabitants of poor-houses: they have their separate dwellings, their gardens, and a small pension. Those only whose conduct has been generally honourable being admitted to these asylums, the metal badge which is worn in some instances, so far from being considered as a disgrace, is regarded as a mark of honour.

Different agricultural societies bestow rewards upon servants who have lived during a certain number of years in the same place; this circumstance being with reason considered as a proof of fidelity and good conduct.

Some of these societies also give rewards to day-labourers who have brought up a certain number of children without having received assistance from their parishes. This is an encouragement to economy, and to all the virtuous habits which it implies: but as a means of remedying the inconveniences arising from the poor laws, its effect is extremely feeble.

In both these cases, the reward generally consists of money: but the money is con-

* Humilis in plebe et ideo ignobilis puerpera, supplicii causâ carcere inclusâ matre, cum impetrasset aditum, a janitore semper excussa, ne quid inferret cibi, deprehensa est uberibus suis alens eam. Quo miraculo matris salus donata filiæ pietati est, ambæque perpetuis alimentis: et locus ille eidem consecratus deæ, C. Quintio M. Acilio Coss. templo Pietatis extructo in illius carceris sede. — *Plin.* lib. vii. c. 36.

† In the report respecting l'Hotel Dieu, by Bailli, a table of the mortality in different hospitals is given, and the process of his calculations.

‡ I refer here to *L'Analyse des Procès-verbaux des Conseils de Département*; a work in 4to, published in France in 1802. This work consisted of the answers to a series of questions, addressed to each department, by the minister of the interior.

These tables have been discontinued. Such is the fact. I do not endeavour to ascertain the cause.

nected with honour; the notoriety given to the reward operates as a certificate in favour of the individual in his particular district.

By examining everything which has been done in this respect in Holland, Switzerland, England, and elsewhere, we should become possessed of an assortment of remuneratory expedients, applicable to almost every class in society. Everything depends, however, upon the mode of application. For this duty, governments are entirely unfit: it is local inspection alone which can gain a knowledge of circumstances and superintend the details.

After all, just and discriminating public esteem — that is to say, public esteem founded upon the principle of utility—is the most potent, the most universally applicable, of all the species of reward. If virtue be held in public estimation, virtue will flourish: let it cease to be held in such estimation, it will decline in the same proportion. The character of a people is the moral climate which kills or vivifies the seeds of excellence.

An inquiry into the causes of the high respect in which, under certain governments, particular virtues were held — why the virtues of a *Curtius*, of a *Fabricius*, of a *Scipio*, were nourished and developed at Rome — why other countries and other times have produced only courtiers, parasites, fine gentlemen and wits, men without energy and without patriotism, — would require a moral and historical analysis, only to be completed by means of a profound study of the political constitutions and particular circumstances of each people. The result would, however, prove, that the qualities most successfully cultivated, were those held in most general esteem.

But public esteem, it may be said, is free, essentially free, independent of the authority of governments. This copious fund of rewards is therefore withdrawn from the hands of the supreme authority! This, however, is not the case: governments may easily obtain the disposal of this treasure. Public esteem cannot be compelled, but it may be conducted. It requires but little skill on the part of a virtuous sovereign to enable him to apply the high reward of public esteem to any service which his occasions may require.

There already exists a degree of respect for riches, honour, and power: if the dispenser of these gifts bestow them only upon useful qualities—if he unite what is already esteemed to what ought to be estimable, his success is certain. Reward would serve as a proclamation of his opinion, and would mark out a particular line of conduct as meritorious in his eyes. Its first effect would be that of a lesson in morality.

Unrewarded, the same service would not acquire the same degree of notoriety. It would be lost among the multitude of objects soliciting public attention, and remain undistinguished from the pretensions, well or ill founded, respecting which public opinion is undecided. Furnished with this patent from the sovereign, it becomes authentic and manifest: those who were ignorant are instructed, those who were doubtful become decided: the inimical and the envious are rendered less bold: reputation is acquired, and becomes permanent. The second effect of the reward consists in the increase of intensity and duration given to public esteem.

Immediately, all those who are governed by views of interest, who aspire to honour or fortune — those who seek the public good, but who seek it like ordinary men, not as heroes or martyrs — eagerly press into that career in which the sovereign has united private and public interest. In this manner, a proper dispensation of favours directs the passions of individuals to the promotion of the public welfare, and induces even those who were indifferent to virtue or vice, to rank themselves upon that side which promises them the greatest advantage.

Such being the power of sovereigns, he must be extremely inexpert in the distribution of honours, who separates them from that public esteem which has so decided a tendency to unite with them. Nothing, however, is more common. Instances may be found, in most courts, of splendid decorations of stars and garters in double and triple range, which do not even give a favourable turn to public opinion. They are considered as proofs of favour, but not as signs of merit.

"Honours in the hands of princes resemble those talismans with which the fairies, according to the fables, were wont to present their favourites: they lose their virtue whenever they are improperly employed."*

CHAPTER XVII.

ACCOMPANIMENTS TO REMUNERATION.

AFTER having exhibited in what manner the matter of wealth is applicable to the purposes of reward, we proceed to show other uses derivable from it for the public service, which are not remuneratory.

The idea of reward will be much clearer when it shall have been distinguished and separated from these accessory uses, which have certain relations with it: —

1. *Wages necessary for the support of life.* — Servants must be fed whilst they are employed, and there are cases in which it is necessary to feed them even before they begin to work. If the wages paid do not exceed what is necessary for this purpose, as is sometimes the case among the soldiery, and espe-

* Helvetius.

cially if the enrolments are involuntary, such wages, being absolutely necessary, are not reward.

2. *The instruction of servants.* — Certain kinds of service require advances from government for this object. If this instruction require much time, it is naturally begun at an early age, and is then called education. This employment of the matter of reward is sufficiently distinct from that which regards subsistence, with which, however, it is very frequently combined and confounded. If there be a sufficient number of individuals willing to bear this expense, so much the better; otherwise, it is necessary that government should bear it for them. This has almost everywhere been thought to be the case with respect to the church. It has also generally been considered necessary in new countries, or countries but little advanced in the career of prosperity with respect to the teachers and professors in most branches of science. In the war department, the corps of cadets is a nursery for young officers. The foundations of public schools are nurseries for the church. The greater number, however, of these foundations, are owing rather to the good intentions of individuals, than to the cares of governments.

3. *Equipment.* — That an individual may be in a condition to render service, he must be furnished with the necessary equipments. The warrior wants his accoutrements — the astronomer his observatory — the chemist his laboratory — the mechanic his machines — the naturalist his collections of natural history — the botanist his garden — the experimental farmer a plot of ground, and funds to enable him to improve it

4. *Indemnity.* — When an individual is only indemnified, he is not rewarded: reward, properly speaking, only begins when indemnity is complete. Do we wish for services, we ought to recollect that, by the person from whom we seek to obtain them, the inconveniences of every sort which compose the burthen of the service will be put into one scale, the advantages he finds attached to it into the other. To the head of indemnity belongs everything necessary to produce an equilibrium between the two; it is only the excess which is thrown into the scale of advantages which strictly belongs to the head of reward.

5. *The assuring responsibility.* — In so far as the matter of reward is employed for this purpose, it is employed in laying a foundation for the infliction of punishment. The stock of punishment is in itself inexhaustible; but when the body is withdrawn from the hands of the ministers of justice, corporal punishment cannot be inflicted, and all other punishments can be compensated. If a servant possess property of his own, so much the better: if he possess none, and a salary be given to him, he will always have so much to lose; the loss of this salary will be a punishment he will always be liable to undergo, whatever may become of him.

The principal use of this employment of the matter of reward, is in the case of offices which place property in the hands of those who fill them. If there be no other means of securing their probity, it would not be bad economy to make their appointments amount in value to but little less than the highest interest they could reap from the largest sum they ever have in their hands. This would be to make them assure against their own dishonesty. The difference between the actual salary and the least salary they could be induced to accept, would constitute the premium. It is rarely that a distinct sum is appropriated to this purpose: on the one hand, this end is partly effected by suretyship; and on the other, the sum considered requisite for the purposes of indemnity and reward equals or surpasses what could be proposed to be allowed for it: but this function is not the less distinct from all the rest.

6. *A guarantee against temptations.* — Money, like the most valuable articles of the medical pharmacopœia, may serve either as a poison or an antidote, according as it is applied. This employment of the matter of reward resembles that last mentioned, without being confounded with it. Money employed for assuring responsibility will produce its effect, though the individual be already corrupted. The use of money employed as a guarantee against temptation, is to prevent corruption. A less sum may suffice in this case than in the former: in that, it was necessary that the revenue granted should preserve some proportion to the sum confided; in this, such proportion is not required: the measure to be observed is only that of the wants of the individual placed in the rank that the office he occupies confers. In a word, salary, considered as a pledge, is only useful in the prevention of theft; money, employed as an antiseptic, is equally useful in the prevention of peculation in all its forms, in the prevention of all improper conduct which can have for its motive the desire of money, and for its means the situation in which the individual is placed by his office.

7. *The support of dignity.* — Public opinion exacts — it matters not by what reason — from every individual possessed of a certain rank, a certain expenditure: his wants are thus increased in proportion to his dignity. Dignity, deprived of the wealth necessary for its support, furnishes, in proportion to its extent, an incentive to malversation, and at the same time generally furnishes the opportunity. As an antidote to such temptations, money may therefore sometimes be bestowed for the sup-

port of dignity. The good of the service may also require the same thing. It is incontestably true, that between wealth and power there subsists an intimate and natural union. Wealth itself is power: it may be proper, therefore, that the support of the respect which it commands be not refused in favour of certain employments, in which much depends upon the place they hold in public opinion.

8. Another use of the matter of reward consists in *the excitement of alacrity;* I mean, the production of an habitual disposition to do what is required with pleasure. The greater the degree of mental enjoyment, the quicker and more lively are one's ideas, and the larger the quantity of work which can be performed in a given time. The mind, in a happy mood, acts with incomparably more ease than when agitated by grief; or even in its ordinary condition, when it is moved only by habit. It is the same with the bodily powers. Who knows not how much the power of the muscles depends upon the energy of the mind? What comparison is there between the labour of slaves and of free men? It is upon this that the superiority of hired soldiers over unpaid and arbitrary levies depends. In the one case, as in the other, the motive which leads to exertion consists in the expectation of being treated according to their behaviour: the motive is nothing else but the fear of pain. But in the first case, there is the gratification of reward to sustain the alacrity; in the other, the labour has no other accompaniment but grief.

The simple expectation of a reward, how large soever it may be, will not always produce the same effect as a reward previously bestowed. The condition of expectancy in which the individual finds himself in such a case, is a mixed and uncertain state, in which despair and hope may alternately predominate.

The danger to be guarded against is, lest rewards previously bestowed should produce diversions little favourable to labour, either by suggesting the idea of some more favourite occupation, or by supplying the means of its pursuit. The progress of the thoughts may be accelerated, but the thoughts excited may be of a different nature: the dull ideas of labour may be supplanted by the enlivening considerations of shows and of pleasure.

Whether or not it is proper to bestow such rewards, depends upon the character of the individual: that character must be known, before it is possible to determine what will be their effect; but in every case there can be no greater folly than to waste in previous gratifications everything which is destined for reward.

In conclusion, these distinctions ought not to be abused The expense of rewards need not be increased on account of each of these items; it is not necessary to appropriate a distinct sum to each. The same sum may serve for many, and even for all. That which suffices for assuring responsibility, will in general suffice as a guarantee against temptations, and *vice versâ*, so far as ends so uncertain may be effected by such means, — and will in every case suffice for indemnification. That which suffices for equipment, may serve in part for the support of dignity and the excitement of alacrity: that which suffices for the maintenance of dignity will be sufficient for almost all the other ends; and the whole of whatever is employed for any other of these purposes, except equipment, cannot but serve for subsistence.

BOOK II. — REWARDS APPLIED TO OFFICES.

CHAPTER I.

SALARY — HOW A REWARD.

THERE are many species of service, and even services of a positive nature, of which governments stand in constant and uninterrupted need: such for the most part are the duties of those who are employed in the different departments of every government. The political state or condition, on account of which individuals possessing it are considered liable to render these services, is called a place, an office, or an employment. To these places it is both natural and customary to attach, under the title of emolument, certain portions of the matter of wealth. If such emolument be determinate in amount, and paid at regularly recurring periods, it is called a salary.

It is the nature of a reward to operate as a motive, and in that capacity to give birth to acts which, by the person by whom the reward is held up to view, are esteemed services: the greater the reward, the greater is the motive it constitutes; the greater the motive, the more strenuous the exertion it has a tendency to produce: and if the value of the service be susceptible of an indefinite degree of perfection, the more strenuous the

exertion to perform it, the greater, as far as depends upon the will of the party, will be the value of the service. Hence it follows, that if salary be reward, as far as funds can be found, salaries cannot be too large. How different the state of things presented to us when we consult experience! We see small salaries, and the service admirably well performed: large salaries, and nothing done for them. In certain lines, we see the service regularly worse and worse performed, in proportion to the largeness of the salary. Where then lies the error? In experience there can be none: in the argument there is none. The error lies in its not being properly understood: and that in general it has not been properly understood, the bad management and weak measures so frequent in this line are but too pregnant proofs. To understand the argument aright, two points must be observed: The one is, to consider, for illustration's sake, that just in the same manner as punishment, — and in no other manner, though with less certainty of effect, — is reward capable of acting as a motive: the other point is, to consider what is really the service for which a salary is a reward.

What, then, is the service, with respect to which a salary operates as a motive? The answer which would be generally given to this question is, the *continued* service belonging to the office to which the salary is annexed. Obvious as this answer may seem, it is not the true one. The service, and the only service, with respect to which a salary can operate as a motive, is either the simple instantaneous service of taking upon one the office, or the permanent service of continuing to stand invested with it. If the duties of the office — the services in the expectation of which the salary annexed to the office is bestowed, happen to be performed, it cannot be owing merely and immediately to the salary: it must be owing to some other motive. If there were no other motive, the service would not be rendered. Nothing is done without a motive: what, then, is this other motive? It must be either of the nature of reward or punishment. It may by possibility be of the nature of reward; but if it be so, one or other of these rewards would seem superfluous: in common, it is principally of the nature of punishment. In as far as this is the case, the service for which the salary, considered as a reward, is given, is the service of taking upon one the obligation constituted by the punishment — the obligation of performing the services expected from him who possesses the office.

That the zeal displayed in discharging the duties of an office should not be in proportion to the salary, will now no longer appear strange. Experience is reconciled to theory. This subject will receive elucidation, if we substitute punishment for reward, and consider what tendency such a motive would have to give birth to any service, if connected with it in the same manner as a salary is annexed to an office.

Suppose a schoolmaster, intending to conduct the business of his school with regularity, were to make it a rule, on a certain day, at the beginning of every quarter, to call all his scholars before him, and to give each ten lashes, committing their behaviour during the rest of the quarter altogether to their discretion: — the policy of this master would be the exact counterpart of the founder of the school towards the master, if he has sought to attach him to the duties of his office by bestowing upon him a salary. Suppose the master, finding that under this discipline the progress of his scholars did not equal his expectations, should resolve to increase his exertions, and accordingly should double the dose of stripes: — his policy in this case would be the exact counterpart of the founder, who by the single operation of increasing the master's salary, should think to increase his diligence.

A salary is not a reward for any individual service of the number of those which are rendered in consequence of a man's acceptance of the office to which the salary is annexed. For the rendering of any one of these services, the salary presents him not with any motive which can come under the head of reward: the motives which it gives him belong entirely to the head of punishment. It is by fear only, and not by hope, that he is impelled to the discharge of his duty — by the fear of receiving less than he would otherwise receive, not by the hope of receiving more. Though he work ever so much more or better than a man who holds his office is expected to work, he will receive nothing more than his salary, if the salary be all that he has to hope for. By working to a certain degree less or worse, he may indeed stand a chance of having the salary, or a part of it, taken from him, or he may be made punishable in some other way: but if he continue to keep clear of that extreme degree, in such case let him work ever so little or ever so badly, he will not, as far as artificial punishment is concerned, be ever the worse. He has therefore no motive, so far as the salary is concerned, for endeavouring to pass the line of mediocrity; and he has a motive, the motive of indolence or love of ease, for stopping as far short of it as he can with safety.

Suppose, for instance, a salary of £4000 a-year annexed to the office of a judge: of all the services he may come to perform in the discharge of his function, of which one is this salary the reward? Of no one whatever. Take any one of the causes which would regularly come before him for hearing: though he were to attend, and to display ever so much

diligence and ever so much ability in the hearing of it, he would receive no more that year than his £4000; though he were to absent himself altogether, and leave the business to his colleagues, he would receive no less: in short, provided he does not so far swerve from his duty as to subject himself to fine or deprivation, whether he perform his duty ever so well, or ever so ill — whether he decide many causes or few — whether his attendance be constant or remiss — whether he display ever so much or ever so little ability, — his salary is the same. Not that a man in this exalted station is in any want of motives to prompt him to exert himself in the discharge of its duties: he has the pleasures of power, to balance the pains of study — the fear of shame, to keep him from sinking below mediocrity — the hope of celebrity, to elevate him above it, to spur him on to the highest pitch of excellence. These motives are presented to him by his station, but they are not presented to him by his salary.

The services, and the only services, which the salary presents a motive for his performing, are, in the first place, the instantaneous act of taking upon him the station — that is, of subjecting himself to the obligations annexed to it; and in the event of his violating any of those obligations, to the punishments annexed to such violations: in the next place, the discharging of the smallest portion of those obligations which it is necessary he should discharge, in order to his receiving such or such part of the salary. Let it, for instance, be paid him quarterly: if the first quarter be paid him in advance, it will afford him no motive of the nature of reward for doing any of the business of that quarter. He has that quarter's salary; nor can he fail of enjoying it, unless, in the way of punishment, it be afterwards taken from him. If it be not paid him till the end of the quarter, the case will be still the same, unless proof of his having rendered certain services — the having attended, for example, at certain times — be necessary to his receiving it. With this exception, it may equally be said, that in both cases, for any other than the instantaneous act of taking upon him the burthen of the station for that quarter, he has no reward, nor any motive but what operates in the way of punishment.

This distinction is of importance; for if the salary given were the inducement of performing the services, the chance of having them performed, and well performed, would be exactly as the magnitude of the salary. If, for example, fifty pounds sterling a-year sufficed to insure fifty grains of piety, assiduity, eloquence, and other sacerdotal virtues in a curate, — five thousand of these same pounds ought to insure five thousand grains of these same virtues in a bishop or archbishop. But what everybody knows is, that this proportion does not hold; on the contrary, it most frequently happens that the proportion is inverse: the curate labours much, the bishop little, and the archbishop less.

The chance of service is as the magnitude of the punishment; and if the salary can be withdrawn, it is so far indeed as the magnitude of the salary: but it may be equally great without any salary—by the substitution of any other punishment instead of loss of salary.

We see, then, how it is that a salary, be it great or small, independently of the obligation which it pays a man for contracting, has not in itself the smallest direct tendency to produce services; whilst experience shows, that in many cases, in proportion to its magnitude, it has a tendency to prevent them.

CHAPTER II.

RULES AS TO EMOLUMENTS.

Before we enter upon this subject in detail, it may be necessary to remark, that the proper application of the following rules will depend upon the nature of the service required, and its various local circumstances. It is only by observing the peculiar character assumed by abuse in each office, that appropriate remedies for each particular evil can be provided. Since it is impossible to make a complete catalogue of all errors, and to anticipate every species of abuse, the rules laid down may not constitute a perfect system. They may, however, serve as a warning against errors and abuses which have by experience been found to exist, and also against some which may be imagined likely to exist. It is useful to erect beacons upon rocks whose existence has been made known by the shipwrecks they have caused. Among the rules about to be given, some may appear so self-evident as almost to seem superfluous: but if it can be shown that errors have arisen from the neglect of them in practice, such rules, though not entitled to be considered as discoveries, must at least be regarded as necessary warning; they may teach nothing new, but they may serve to recall principles which it is desirable should be constantly and clearly remembered.

Rule I. Emoluments ought in such manner to be attached to offices, as to produce the most intimate connexion between the duty and the interest of the person employed.

This rule may be applied in insuring assiduous attendance on the part of the persons employed. In different offices, different services are required; but the greater number of offices have this one circumstance in common: that their duties may be performed, it is necessary that the individual holding the office should be at a certain time in a certain

place. Hence, of all duties, assiduous attendance is the first, the most simple, and the most universal. In many cases, to insure the performance of this duty, is to insure the performance of every other duty. When the clerk is at his desk, the judge upon the bench, the professor in his school, — if there be nothing particularly irksome in their duty, and they can do nothing else, rather than remain idle, it is probable they will perform their duty. In these cases, the service required being of the continual kind, and in point of quality not susceptible of an indefinite degree of perfection — the pay being required not for certain services, but for such services as may come to be performed within a certain space of time, — it may without impropriety be given in the form of a salary. But even here, the policy of making reward keep pace with service* should be pursued as closely as possible; and for this purpose, the long continued mass of service should be broken down into as many separate services as possible — the service of a year into the service of days. In the highest offices, an individual, if paid by his time, should, like the day-labourer, and for the same reason, be paid rather by the day than by the year. In this way he is kept to his duty with more than the effect, and at the same time without any of the odium, of punishment.

In the station of a judge, it is not common to exact attendance by the force of punishment—at least not by the force of punishment to be applied in each instance of failure. But if it were, the infliction of that punishment for trivial transgressions — that is, for one or a few instances of non-performance — would be thought harsh and rigorous, nor would anybody care for the odium of standing forth to enforce it. Excuses would be lightly made, and readily accepted. Punishment in such cases being to the last degree uncertain, would be in a great measure ineffectual. It might prevent continual, but it would never prevent occasional, or even frequent, delinquency. But what cannot be effected by punishment alone, may be effected by punishment and reward together. When the officer is paid separately for each day's attendance, each particle of service has its reward: there is for each particle of service an inducement to perform it. There will be no wanton excuses, when inconvenience adheres inseparably to delinquency without the parade of punishment.

The members of the French Academy, and the Academy of Science, notwithstanding all their dignity, are paid their salaries by the day, and not by the year. And who are the individuals, how low or how high soever, who cannot, and who ought not, to be paid in this manner? If pride have a legitimate scruple, it is that which refuses to receive the reward for labour which it has not performed; whilst, as to the objection which might arise from the minute apportionment of the salary, it is easily removed by counters given from day to day, and converted into money at fixed periods.

In the act of parliament for establishing penitentiary houses, among other good regulations, this method of insuring assiduity of attendance has been adopted. The three superintendents receive, as the whole of their emoluments, each a share of the sum of five guineas, which is directed to be distributed each day of their attendance equally among those who are present.

A more ancient example of this policy may be found in the incorporated society in London for the assurance of lives. The directors of this establishment receive their trifling emoluments in this manner; and thus applied, these emoluments suffice. This plan has also been adopted in the case of commissioners of bankrupts, and by different associations.

These examples ought not to be lost; and yet, from not having been referred to general principles, they have not possessed the influence they ought to have. How often have regulations been heaped upon regulations without success! How many useless decrees were made in France to insure the residence of the bishops and beneficed clergy!

In England, we have not in this respect been more successful; that is to say, more skilful. Laws have been enacted against the non-residence of the clergy—laws badly contrived, and consequently useless. Punishment has been denounced, and a fine imposed, which being invariable in amount, has sometimes been greater and sometimes less than the advantage to be derived from the offence. For want of a public prosecutor in this, as in so many other cases, it has been necessary to rely upon such casual informers as may be allured by a portion of the fine. The love of gain has seldom proved a motive sufficiently strong to induce an endeavour to obtain this reward; whose value, not to mention the expenses of pursuit, is destroyed by infamy. Till this motive be reinforced by personal animosity, which bursts the bonds of infamy, these laws are powerless.

Such cases, which may occur once or twice in the course of ten years throughout the whole kingdom, are neither sufficiently frequent, nor well known, to operate as examples. The offence remains undiminished: the useless punishment constitutes only an additional evil; whilst such laws and such methods, powerless among friends, serve only to bring enemies into contact! Whenever it is desirable that a clergyman should live in the midst of his parishioners — that is to say, when they are amicable — the law is a dead

* See Book I. Chap. X. Rule 3.

letter: its power is exerted only when they are irreconcilable enemies; that is, in the only cases wherein its utility is problematical, and it were to be wished that its execution would admit of an exception. His return into his parish is a triumph for his enemies, and a humiliation for himself.

Had the salaries paid to the professors in the universities been interwoven with their services, it might have been the custom for some of these pretended labourers to have laboured for their hire; and to be a professor, might have meant something more than having a title, a salary, and nothing to teach.

A salary paid day by day has an advantage beyond that of insuring assiduity of attendance; — it even renders a service agreeable, which with an annual salary will be regarded as purely burthensome. When reward, instead of being bestowed in a lump, follows each successive portion of labour, the idea of labour becomes associated with pleasure instead of pain. In England, husbandmen, like other labourers, are paid in hard money by the week, and their labour is cheerfully and well performed. In some parts of the continent, husbandmen are still paid as they were formerly in England, by houses and pieces of land given once for all; and the labour is said to be performed with all the slovenliness and reluctance of slavery.

Rule II. Emoluments ought in such manner to be attached to office, as to produce the greatest possible degree of excellence in the service rendered.

Thus far the subject has only been considered as applicable to insuring attendance in cases where assiduity of attendance appears to suffice for insuring the performance of all other duties. There follow some cases, in which it appears possible to apply the same principle either in the prevention of abuse, or in insuring an extraordinary degree of perfection in the employment of the powers which belong to certain stations.

Instead of appointing a fixed salary, invariably of the same amount as the emolument of the superintendent or superintendents of a prison, a poor-house, an asylum for orphans, or any kind of hospital whose inhabitants depend upon the care of one or a small number of individuals, whatever may be the difference in the degree of attention displayed, or the degree of perfection with which the service is performed, — it would be well to make the emolument of such persons in some measure depend upon the care with which their duties have been performed, as evidenced by their success. In a penitentiary, or other prison, that the prisoners might be insured from all negligence or ill-treatment, tending directly or indirectly to shorten their lives, make a calculation of the average number of deaths among the prisoners in the particular prison, compared with the number of persons confined there. Allow the superintendent each year a certain sum for each person of this number, upon condition, that for every prisoner who dies, an equal sum is to be withheld from the amount of his emoluments. It is clear, that having a net profit upon the lives of all whom he preserves, there is scarcely any necessity for any other precaution against ill-treatment, or negligence tending to shorten life.*

In the naval service, the laws of England allow a certain sum for each vessel taken or destroyed, and so much for every individual captured. Why is not this method of encouragement extended to the military service?

Is the commander of an army employed in defending a province, — allow him a pension which shall be diminished in proportion to the territory he loses. Is the governor of an important place besieged, — allow him so much for every day that he continues the defence. Is the conquest of a province desirable, — promise to the general employed, besides the honours he shall receive, a sum of money which shall increase in proportion to the territory he acquires, besides giving him a pension, as above, for preserving it when acquired.

To the principal duty of taking and destroying those who are opposed to him, might be added the subordinate duty of preserving the living machines whose exertions are necessary for its accomplishment. The method proposed for the preservation of prisoners, — why should it not be employed for the preservation of soldiers? It must be acknowledged, that no reward exclusively attached to this subordinate duty could, in the mind of a prudent commander, add anything to the weight of those arguments which arise out of the principal object. A soldier when he is ill, is worth less than nothing: a recruit may not arrive at the moment — may not arrive at all, and when he has arrived, he is not like a veteran. If therefore, it be proper to strengthen motives thus palpable, by a separate and particular reward, it ought at least to be kept in a subordination sufficiently marked with respect to the principal object.

Thus much as to a time of war. In time of peace, the propriety of this method is much less doubtful. It is then that the attention of a general should be more particularly directed

* "The managers of *L'Hôtel Dieu* were used to charge fifty livres for each patient who either died or was cured. M. de Chamousset and Co. offered to undertake the management for fifty livres, for those only who were cured. All who died were not to be reckoned in the bargain, and were to be at their expense. The offer was so admirable, it was not accepted: it was feared that they would not be able to fulfil their engagement. Every abuse which it is attempted to reform is the patrimony of those who have more credit than the reformers." — *Quest. Encycl.* art. *Charité.*

to the preservation of his soldiers. Make him the insurer of their lives, and he will become the rival of Esculapius in medical science, and of Howard in philanthropy. He will no longer be indifferent, whether they encamp upon a hill or in a morass. His vigilance will be exercised upon the quality of his supplies and the arrangement of his hospitals; and his discipline will be rendered perfect against those vices of armies, which are sometimes no less destructive than the sword of the enemy.*

The same system might be extended to ships of war, in which negligence is so fatal, and in which general rules are so easily enforced. The admiral, or captain, would thus have an immediate interest in the preservation of each sailor. The admirable example of Captain Cook, who circumnavigated the world, and traversed so many different climates and unknown seas, without the loss of a single sailor, would no longer be unfruitful. His instructions respecting diet, change of air, and cleanliness, would not be neglected. The British navy, it is true, is much improved in these respects: but who can tell how much greater perfection might be attained, if to the already existing motives were added the influence of a constantly acting interest, which, without injuring any virtue, might supply the place of all, if they were wanting?

In the application of these suggestions, there may be difficulties: are they insurmountable? It is for those who have had experience to reply.

In the treaty made by the Landgrave of Hesse Cassel, relative to the troops which the British government hired of him to serve in America, one stipulation was, that for every man not returned to his country, he should receive thirty pounds. I know not whether such a stipulation were customary or not: but whether it were or not, nothing could be more happily imagined, either for the fiscal interest of the sovereign lender, or the interest of the individuals lent. The spirit of party found in this stipulation a theme for declamation, as if its only effect were to give to the prince an interest in the slaughter of his subjects; whilst, if anything could counterbalance the mischievous effects of the treaty, it was this pecuniary condition. It gave to these strangers a security against the negligence or indifference of the borrowers, on account of which they might more willingly have been exposed to danger than native subjects. The price attached to their loss would act as an insurance that care should be taken to preserve them.

* A slight sketch is all that can be attempted: the details would occupy too much space. A general might be made the insurer, as it respects those who die of disease, but not of those who are killed.

It has been said, that in some countries the emoluments of the commanders of regiments increase in proportion to the number of non-effectives; that is to say, that they receive always the same amount for the pay of their corps, though they have not always the same number of men to pay. Such an arrangement is precisely the opposite of what is recommended above. The number of non-effectives increasing by death or desertion, the commander gains in money what he loses in men. Every penny which he is thus permitted to acquire is a reward offered, if not for murder, at least for negligence.

Note. — The principles thus laid down by Mr. Bentham are susceptible of great diversity of application. When Mr. Whitbread brought into parliament his bill for the establishment of schools for the education of the poor, I flattered myself that I had discovered one instance to which they might very readily be applied; and, in a letter addressed to Sir Samuel Romilly, from which the following paragraphs are extracted, I explained my ideas upon the subject. It will be perceived, that the whole plan depends upon the principles laid down in this chapter: —

"Mr. Whitbread has been fully aware of the necessity of superintendence in respect to the masters, — and he has proposed to commit it to the clergymen and justices of the peace; but it is not difficult to foresee, that this burthensome superintendence will be inefficacious. No good will be effected unless the interest of the master be constantly combined with all parts of his duty. The only method of accomplishing this, consists in making his reward depend upon his success; in giving him no fixed salary; in allowing him a certain sum for each child, payable only when each child has learned to read; — in a word, in paying him, as workmen are sometimes paid, by the work done.

"When he receives a fixed salary, the master has only a slight interest in the progress of his pupils. If he act sufficiently well to prevent his being discharged, this is all that can reasonably be expected.

"If he receive no reward till the service be performed, he has a constant interest in performing it quickly. He can relax his exertions only at his own expense. There is no longer any necessity for superintendence. The master will himself seek to improve the modes of instruction, and to excite the children to emulation. He will be disposed to listen to the advice, and to profit by the experience of others.

"When he receives a fixed salary, every new scholar increases the trouble of the master, diminishes his exertions, and disposes

him to complain. Upon the plan which I propose, it is the master who will stir up the negligent parents; it is he who will become the servant of the law. Instead of complaining that he has too many pupils, he will only complain if he have too few. Should he have three or four hundred, or even as many as Mr. Lancaster, like him he would find the means of attending to them all; he would employ the most forward in instructing those who were less advanced, &c. &c.

"Should a negligent or incapable master be appointed, he would be forced to quit his place. Substitute for this plan, examinations, depositions, and decisions, and see what would be the consequence.

"There would be no difficulty in the execution of this proposed plan. It would be sufficient that twice or thrice in the year, the clergyman, and certain justices of the peace, or other persons of consequence, who were willing to promote so useful a work, should meet together for two or three hours at the school-house. The examination of each scholar would not occupy more than half a minute. The master himself might be trusted for selecting only such as were capable of undergoing the test, and an honorary would thus be added to his pecuniary reward, by the publicity given to his success." — *Dumont.*

CHAPTER III.

FEES AND PERQUISITES — NONE.

ANOTHER expedient is often employed in the payment of public officers: I refer to the fees which they are sometimes authorized to receive on their own account, from those who require their services.

This arrangement is attended with a specious advantage, and a real danger. The advantage is, that the reward seems to be exactly and directly in proportion to the labour performed: the danger lies in the temptation given to such officers to increase their emoluments, by increasing the difficulties of those who need their services. The abuse is easily introduced. It is very natural, for example, that an individual who has been served with an extraordinary expedition, should add something to the accustomed fee. But this reward, bestowed on account of superior expedition in the first instance, infallibly becomes a cause of delay in all which follow. The regulated hours of business are employed in doing nothing, or in doing the least possible, that extraordinary pay may be received for what is done out of office-hours. The industry of all the persons employed will be directed to increasing the profit of their places, by lending one another mutual assistance; and the heads of departments will connive at the disorder, either for their share of the benefit, or out of kindness to their inferiors, or for fear of rendering them discontented.

The inconveniences will be yet greater, if they relate to a service covered with a mysterious veil, which the public cannot raise. Such is the veil of the law. The useless and oppressive delays in legal procedure arise from very complicated causes; but it cannot be doubted, that one of the most considerable of these causes is the sinister interest which lawyers have in multiplying processes and questions, that they may multiply the occasions for receiving fees.

Integrity is more easily preserved in public offices in which there are no fees, than in those where they are allowed. A lawful right often serves as a pretext for extortion. The distinction between what is permitted and what is prohibited, in many cases, is exceedingly minute; and how many temptations may occur of profiting by the ignorance of strangers, when circumstances will insure impunity! An easy method of detecting offences is a great restraint. Whenever therefore fees are allowed, a list of them should be publicly fixed up in the office itself: this will operate as a protection to the persons employed against suspicion, and to the public against vexation.

This mode of rewarding services, supposes that the individuals who stand in need of them should bear the expenses of the establishment. This is true only in case the benefit is solely for those individuals: in all other cases, fees constitute an unequal and very unjustly assessed tax. We shall have occasion to recur to this subject shortly.

CHAPTER IV.

MINIMIZE EMOLUMENT.

Rule III. THE amount of the salary, or other emoluments, attached to every office, ought to be the least that the individuals qualified to execute its duties are willing to accept for their performance.

The fair and proper price of any vendible commodity is the least that anybody will take for it: so that the expectation of like payment shall be a sufficient inducement to the labour requisite to produce other like articles in future. The fair and proper price of any service is the least that anybody will do it for: so that if more were given, it would be done either not at all the better, or not so much the better as that the difference of quality should be equivalent to the difference of expense. In this proper and necessary price is included, of course, everything necessary to enable the individual to perform, and to continue to perform, the service; and also whatever is necessary on account of the disadvantages attending the service, and on ac-

count of the chance which may be given up of the advantages that might be expected from other services.

At the first establishment of an office, it may be difficult accurately to determine what ought to be the amount of its emoluments: in this, as is the case with every commodity when carried to market for the first time, we can only be guided by chance. The number and character of the candidates will, however, soon determine whether the amount offered be too large or too small.

According to this rule, the salaries paid to the judges in England, which appear so considerable, are scarcely enough; since, as we have already seen, they are not sufficient to induce those who are best qualified to discharge the duty, to undertake the office.

In France, before the Revolution, scarcely any salaries were paid to the judges: they were not drafted from the class of advocates, and no sacrifice was required of them when they entered upon their duties; it was not necessary that they should be possessed of much experience, and their reward consisted principally in the honour and respect attached to their station. In England, the number of judges is so small, that there is no place for cyphers: it is necessary that each judge should possess, from the first day he enters upon his office, that skill which, in the present state of immensity and obscurity in which the law is found, can only be the fruit of long study. In France, among the enormous multitude of her judges, there was always a sufficient number endowed with the requisite skill; and the novice might, so long as he chose, preserve a Pythagorean silence.

A method of ascertaining the proper amount of emoluments for any office, simple as it is efficacious, is afforded by allowing the persons employed to discharge their duty by deputy. If no one employ a deputy, the emoluments cannot be much too great: if many individuals employ deputies, it will be only necessary to observe what is paid to the deputies: the salary of the deputy is the proper salary for the place.

If this rule be applied to the emoluments of the clergy, and it be asked what is the proper price for their services, the answer is not difficult. It is, *primâ facie*, the price given by one class of the clergy, and received by the other; it is the current price of curacies. I say always *primâ facie;* for, in reality, the current price is somewhat greater; part of the price being made up in hope. For insuring the due performance of all the duties of their office, this price is found to be sufficient. The possession of any greater emolument is not only useless but pernicious, inasmuch as it enables them to engage in occupations incompatible with the due performance of their function, and as it tends to give them a distaste for the duties of that function.

The inequality observable in the emoluments of the established clergy is also disadvantageous in respect to the greater number of ecclesiastics. The comparison which they make between their condition, and that of the rich incumbents, diminishes still further, in their eyes, the value of what they receive. A reward so unequal, for equal services, degrades those who receive only their proper portion. The whole presents the appearance of a lottery — of favour and injustice, ill according with the moral character of their vocation.

It is a good rule of economy to employ only real labourers, who do not think themselves superior to the work they have to perform. Dutch florists ought not to be employed in the cultivation of potatoes.

It is well also fully to occupy the time of the individuals employed. The duties of many public offices require only three or four hours attendance daily. After the office-hours are passed, such individuals seldom are able profitably to employ their time. The leisure they possess increases their wants. Ennui, the scourge of life, is no less the enemy of economy. It is among this class, that those who are most discontented with their salaries, are generally found.

CHAPTER V.

NO MORE NOMINAL THAN REAL.

Rule IV. The nominal and real amount of salaries ought to correspond.

In other words, no deduction ought to be made from the real value of a salary, without reducing its nominal amount. The practice which has frequently been adopted in England, of reducing the real value of salaries and pensions by taxes and other deductions, while the nominal amount of the salaries has remained unaltered, has given rise to this rule. In some instances, the deductions thus made have amounted to one-third of the nominal salary.

No advantage arises from this arrangement, but its inconveniences are numerous. In the first place, it is an evil in so far as it spreads an exaggerated idea of the sacrifices made by the public, and the expense incurred under the head of salaries. With respect to the public functionaries, it is an evil to possess an income greater in appearance than reality. The erroneous conceptions hence entertained of their wealth, imposes upon them, in deference to public opinion, the necessity of keeping up a correspondent establishment: under the penalty of being considered niggardly, they are compelled to be extravagant. It is true, the public are aware in general, that salaries and

pensions are subject to deductions; but they are oftentimes only acquainted with a part of the deductions, and they seldom in such cases enter into minute calculations.*

In this manner, the difference between the nominal and real value of a salary tends to produce an increase in the wants of the individual employed. Call the amount of his salary what it really is, and he will be at ease, but every nominal addition will prove a costly ornament. If the opportunity of illicit profit be presented to him, such nominal addition will be an incentive to corruption; and should he not be dishonest, it will prove a cause of distress.

The remedy is simple as efficacious: the change need only be in words.

CHAPTER VI.

COUPLE BURTHEN WITH BENEFIT.

Rule V. THE expenses of an office ought to be defrayed by those who enjoy the benefit of the services rendered by the office.

The author of the Wealth of Nations, in investigating† the manner in which the expense of services ought to be divided, has shown that in some cases it ought to be defrayed by the public — in others, exclusively by those who immediately reap the benefit of the service. He has also shown that there is a class of mixed cases, in which the expense ought to be defrayed partly by the public, and partly by the individuals who derive the immediate benefit. To this class belongs *public education*.

The rule just laid down seems scarcely to stand in need of proof. It may, however, be useful to mention the modes in which it may be violated; as — 1. When, for a service rendered to one person or set of persons, the obligation of payment is imposed upon another. This is partly the case of dissenters who support their own clergy, in so far as they are obliged to pay for the support of the clergy of that established sect from which they dissent. 2. When, for a service rendered to a certain number of individuals, the obligation of payment is imposed upon the public: for example, the expenses of a theatre, wholly or in part paid out of the public purse. 3. When, for a service rendered to the public, the obligation of payment is imposed upon an individual.

With respect to this third case, the examples are but too abundant.

1. The most remarkable example will be found in the administration of justice. At first sight, it may be thought that he who obtains a verdict in his favour reaps the principal, or even the only advantage to be obtained; and therefore that it is reasonable he should bear the expense incurred — that he should pay the officers of justice for the time they have been employed. It is in this manner that the subject appeared even to Adam Smith. (B. v. sec. 2.) Upon a closer examination, we shall discover an important error. The individual in whose favour a verdict is given, is precisely the individual who has received least benefit: setting aside the rewards paid to the officers of justice, how many other expenses, which the nature of things render inevitable, remain! It is he who, at the price of his time, his care, and his money, has purchased that protection which others receive for nothing.

Suppose that among a million persons there have been, for example, a thousand lawsuits in a year: without these lawsuits — without the judgments which terminate them, injustice would have had nothing to hold it in check but the defensive energy of individuals. A million acts of injustice would have been perpetrated in the same time. But since, by means of these thousand judgments, a million acts of injustice have been prevented, it is the same thing as if each complainant had himself prevented a thousand. Because he has rendered so important a servive — because he has exposed himself to so many mishaps, to so much trouble and expense, does he deserve to be taxed? It is as though the militia who defend the frontiers should be selected to bear the expenses of the campaign.

"Who goeth a warfare any time at his own charges?" saith St. Paul. It is the poor litigant who makes war upon injustice, who pursues it before the tribunals at his own risk, and who is made to pay for the service which is rendered by him.

When such expenses are thrown upon a defendant, unjustly dragged into the litigious contention, the case is yet worse: instead of anything having been done for his advantage, he has been tormented, and he is made to pay for having been tormented.

If the expenses are altogether thrown upon the party who is found to have done wrong (although it often happens, owing to the uncertainty either of the facts or of the law, that there has been no wilful wrong on either side,) this cannot be done at first: this party can only be known at the termination of the suit. But then such a judgment would be a punishment; and there is a chance that such a punishment may not be deserved; another chance, that the individual may not be in a condition to support it; another chance, that it will be either too great or too little.‡

* A further inconvenience frequently arises from the expense of collecting and managing such peculiar contributions.

† Book V.

‡ There are many other objections to taxes upon law proceedings, but they do not belong to

II. As another violation of this rule, may be cited the practice of taking fees, as carried on in most custom-houses, and which constituted a great abuse in those of England, previously to the reform introduced by Mr. Pitt. Many of the officers, not receiving salaries sufficient for their maintenance, were allowed to make up the deficiency by fees received for their own advantage. This custom had an appearance of reason. "We pass your merchandise through the custom-house," they might have said; "and you ought to pay for this service." But this reason is deceptive. "Without this custom-house," the merchants might have replied, "our merchandise would have gone straight forward. It is not for our advantage that this costly depôt is established — it is for the general wants of the State; the State, therefore, which you serve, ought to pay you, and not us, whom you torment with your services, which we should be very happy to do without." But it may be said, this expense must be borne by somebody: why should it not be borne by these merchants as well as anybody else? Because it is a partial and unequal tax. Taxes upon merchandise are generally in proportion to the value of the goods; this abusive tax seldom is so. A rich merchant does not feel it; he is reimbursed by the sale of his goods: a poor individual is oppressed by this second contribution, which he finds it necessary to pay to the clerk after he has paid what is due to the Exchequer; and it with reason appears to him the more odious, because it is oftentimes arbitrary.

III. In conclusion, as a last example of the violation of this rule, we mention the emoluments of the clergy, in so far as they consist of tithes. If the services of the clergy contribute to the maintenance of public morality, and obedience to the laws, even those to whom these services are not personally directed are benefited by them — they are useful to the whole state: their expense, whatever ought to be its amount, ought to be borne by the whole community. Distributed as this expense is at present, under the system of tithes, in such manner that every one knows how much and to whom he pays it, no advantage is derived from this knowledge; whilst the inconveniences are but too manifest, in that hatred which so frequently subsists between the parishioners and their minister, the shepherd and his flock; by means of which his labours, so long as this enmity subsists, are rendered worse than useless. Were this expense to be defrayed from the general source of the public treasure, these scandalous dissensions would be avoided; and whether the revenues were more or less ample, it would be possible to preserve a more just proportion between them and the different degrees of labour, instead of floating as at present between £20 and £20,000 per annum, under the direction of chance.*

CHAPTER VII.

BY EMOLUMENTS EXCLUDE CORRUPTION.

Rule V. In employments which expose the public functionary to peculiar temptations, the emoluments ought to be sufficient to preserve him from corruption.

Setting aside all considerations of the happiness of the individual, the interest of the public requires, that in all employments which afford the means of illicit gain, the individuals employed should be placed above want. If this important consideration be neglected, we ought not to be surprised that men urged on by perpetually recurring wants should abuse the powers they possess. Under such circumstances, if they are found guilty of extortion and peculation, they are less deserving of blame than that government which has spread the snare into which it was scarcely possible that their probity should not fall. Placed between the necessity of providing the means of subsistence, and the impossibility of providing them honestly, they will naturally be led to regard peculation and extortion as a lawful supplement, tacitly authorized by the government. The examples of this mischievous economy, and of the inconveniences resulting from it, are more frequent in Russia than under any other European government.

"M. de Launay (Farmer-general under Frederick II.) represented to the king that the salaries of the custom-house officers were too small for their subsistence, and that it would be but justice to augment them; he added, that he could insure to his Majesty that every one would then discharge his duty better, and that the aggregate receipts in all the offices would be larger at the end of the year."—"You do not know my subjects," said Frederick; "they are all rogues where my interests are in question. I have thoroughly studied them, and I am sure they would rob me at the altar. By paying them better, you would diminish my revenues, and they would not rob me less."—"Sire," replied M. de Launay, "how can they do otherwise than steal? Their salaries are not enough to buy them shoes and stockings! a pair of

the present subject. Under the head of procedure, it might be shown that these taxes oppose the ends of justice: under the head of finance, that they constitute a bad source of revenue. The subject has been more fully discussed in the "*Protest against Law Taxes.*"

* Tithes, considered as a tax, are attended with other inconveniences: they belong not to our present subject. They have been exposed by Adam Smith, with that force and precision which characterize that great master.

boots costs them a month's pay! at the same time, many of them are married. And where can they obtain food for their wives and families, if it is not by conniving at the smugglers? There is, Sire, a most important maxim, which in matters of government is too frequently neglected. It is, that men in general desire to be honest; but it is always necessary to leave them the ability of being so. If your Majesty will consent to make the trial I propose, I will engage that your revenues will be augmented more than a fourth," The maxim in morals, thus brought forward by M. de Launay, appeared to the king, — beautiful and just as it really is in itself, — so much the more excellent from being in the mouth of a financier; since men of this class are not in general reputed to know many such. He authorized the experiment; he increased the salaries of the officers by a half, and his revenues were increased a third without any new taxes.*

A salary proportionate to the wants of the functionary operates as a kind of moral *antiseptic*, or preservative. It fortifies a man's probity against the influence of sinister and seductive motives. The fear of losing it will in general be more than equivalent to the ordinary temptations held out by illicit gains.

But in the estimation of a man's wants, it is not merely to what is absolutely necessary that our calculation ought to be confined; — Fabricius and Cincinnatus are not the proper standards to be selected; the actual state of society ought to be considered; the average measure of probity must be our rule. Public opinion assigns to every public functionary a certain relative rank; and, whether reasonably or not, expects from him an expenditure nearly equal to that of persons in a similar rank. If he be compelled to act in defiance of public opinion, he degrades and exposes himself to contempt — a punishment so much the more afflictive, in proportion as his rank is elevated. Wants keep pace with dignity. Destitute of the lawful means of supporting his rank, his dignity presents a motive for malversation, and his power furnishes the means. History abounds with crimes, the result of this ill-judged policy.

If a justification be required for the extraordinarily high salaries, which it is customary to pay to the supreme magistrates who are called *Kings*, it will be found in the principles above laid down. The Americans, by denominating their chief magistrate a *President*, have thereby made a small salary, compared with what is paid in England to the sovereign, answer every purpose of a large one. Why? Because the dignity of the president is compared with that of the other officers of the republic, whilst in Europe the dignity of the sovereign is measured by a sort of comparison with that of other kings. If he were unable to maintain a certain pomp amidst the opulence of his courtiers, he would feel himself degraded. Charles II., to relieve himself from the restrictions imposed upon him by the economy of parliament, sold himself to a foreign potentate, who offered to supply his profusion. The hope of escaping from the embarrassments into which he had plunged himself, drove him, like an insolvent individual, to criminal resources. This mistaken economy occasioned the expense of two successive wars, terminating in a peace more disastrous, perhaps, than either of the wars. Our strength was wasted in oppressing a necessary ally, instead of being employed in checking the ambition of a rival, with whom we had afterwards to contend with diminished resources. Thus the establishment of the *Civil List*, though its amount may appear large, may be considered as a measure of general *security*.

It is true, that the sum necessary to prevent Charles II. from selling himself, or, in other words, the amount which in this instance would have operated as a moral antiseptic, or preservative, could not have been very accurately calculated. A greater or less portion of this antiseptic must be employed, in proportion as there exists a greater or less proclivity towards corruption. Experience is the touchstone of all calculations in this respect. Provided these abuses are guarded against, a low scale of salaries can never be an evil; it must be a good. If the salary be not a sufficient reward for the service to be performed, the office will not be accepted: if it be sufficient, everything which is added to its amount, is so much lavished in pure waste.

CHAPTER VIII.

GIVE PENSIONS OF RETREAT.

Rule VII. PENSIONS of retreat ought to be provided, especially when the emoluments allowed are not more than sufficient to meet the absolute wants of the functionary.†

Pensions of retreat are recommended by considerations of humanity, justice, and good economy: they moreover tend to insure the proper discharge of duty, and constitute a source of responsibility on the part of the individuals employed.

* Thiébault, *Mes Souvenirs de Berlin*, tome iv. p. 126.

† The reader ought to be apprised, that having found in Mr. Bentham's MSS. upon this subject, only the memorandum,[a] "*Pensions of Retreat*," I have confined myself to the most simple exposition of the subject: its details would have been too widely extended.—*Note by Dumont.*

[a] See note by Mr. Bentham on this subject p. 191.

1. There are many cases in which it is not desirable that a public functionary should continue to be employed after his activity and capacity have become impaired. But since the infirmities of age tend to increase his wants, this is not the time in which he will be able to retrench his expenditure; and he will be induced by this consideration, in his old age and impotency, to continue to endeavour to perform, with pain, and even with disgrace, the duties of a station which in his maturity he had filled with pleasure and reputation. To wait till he voluntarily resigns, is to expect a species of suicide; to dismiss him without a pension of retreat, is, in the supposed state of his faculties, a species of homicide. A pension of retreat removes all these difficulties: it is a debt of humanity, paid by the public to its servants.

2. By means of these pensions, the scale of all salaries may be lower than otherwise, without producing any ill effect upon the quality of the services rendered: they will constitute an *item* in the calculation which every individual makes. In the meantime, government will obtain from all, at a low price, services, the ulterior compensation for which, on account of the casualties of human life, will only be received by a few. It is a lottery in which there are no blanks.

3. In all employments from which the individuals are removable at pleasure, the pension of retreat, in consequence of the approach of the period at which it will become necessary or due, will add an increasing value to the salary, and augment the responsibility of the individual employed. Should he be tempted to malversation, it will be necessary that the profit derivable from his malversation should compensate with certainty, not only for the loss of his annual salary, but also for the value of his future pension of retreat: his fidelity is thus secured to the last moment of his continuing in office.

4. We ought not to forget the happiness insured to the persons employed, resulting from the security given to them by the provision thus made against that period of life which is most menaced with weakness and neglect. Hence an habitual disposition to perform the duties of their office with alacrity will arise; they will consider themselves as permanently provided for, and fixed in a situation in which all their faculties may be applied to the discharge of its duties, without being turned aside by vague apprehensions of future distress, and the desire of improving their condition, which so often leads individuals successively to try different stations. Another advantage to the government: instead of being badly served by novices, it will possess a body of experienced functionaries, expert and worthy of its confidence.

The amount of these pensions ought to be regulated by fixed rules, otherwise they will become a source of abuse: offices will be bestowed for the sake of the pension, instead of the pension being bestowed for the sake of the office. They ought also to increase according to the length of service, leaving at all times an inducement to continued exertion; without which precaution, the services of experienced individuals, which it might be desirable to retain, would frequently be lost.

CHAPTER IX.

OF THE SALE OF OFFICES.

If it be desirable that the public servants should be contented with small salaries, it is more desirable that they should be willing to serve gratuitously, and most desirable that they should be willing to pay for the liberty of serving, instead of being paid for their services. Such is the simple but conclusive train of argument in favour of the venality of offices, abstractly considered.

Such an arrangement is attended with another advantage. A sum laid out in the purchase of an office renders the purchaser responsible in a higher degree than he would be, were he to receive a salary equal to, or even exceeding in amount, the interest of the money he has paid. The loss of a salary paid by the public, is merely the cessation of so much gain; the loss of an office which has been purchased, is the positive loss of so much capital which the individual has actually possessed. The impression produced upon the mind by these two species of loss is widely different. The cessation of a gain is generally much less severely felt, than a loss to a corresponding amount. The gain which depends upon external circumstances is always precarious — it cannot be reckoned upon with certainty; on the other hand, if an individual have purchased an office with his own capital, he looks upon it as absolutely his own; it comes to be regarded as a certain, fixed, and permanent source of revenue, and as identified with his original property, upon which he has always reckoned.

When a man purchases an office, it may be fairly presumed that he possesses appropriate aptitude for the discharge of its duties. Are there pecuniary emoluments attached to an office, — the office may be accepted for the sake of these emoluments. Are there no pecuniary emoluments, — the office can be desired only on account of its duties, or of the natural rewards of honour and power which are inseparable from it. Such, at least, is the ordinary state of things. It is, however, possible that such an office might be desired as a means of obtaining some hidden profit prejudicial to the public: but this would be a

particular case, whose existence ought to be established by proof.

It is not by names alone that we can determine whether it be most advantageous for the public, that offices should without emoluments be given away, or when with emoluments should be sold: this question can only be determined by an accurate account, exhibiting the balance of the sums paid and received. If, however, there be any offices without emoluments, for which purchasers can be found, — were it possible to sell purely honorary appointments, offices connected with public pomp and show, it would be entirely consistent with good economy: it would be to convert a tax upon honour, unfelt by any one, but established in favour of the purchasers, into hard cash. A tax would thus be levied upon vanity. The gain would be real, though the bargain, like that of the Lapland sorcerers, were only for bags of wind.

As it respects offices of which the emoluments are fixed, the question of economy is simple: the amount of the emoluments does not differ from a perpetual rent. But when an office is sold, the profits of which, whether received from the public or levied upon individuals, are uncertain in amount, this uncertainty causes a presumption against the economy of the bargain: it is disadvantageous to the public to be subject to uncertain expenses, and it is not probable that these uncertain profits will sell for so large a price as would willingly be paid for a salary equal to their average amount.

Again, as to emoluments derived solely from individuals. These are a species of tax often created and alienated at the same time in favour of the office. The general presumption cannot but be unfavourable to taxes imposed under such circumstances. In former times, when the science of political economy was in its cradle—when taxes and the methods of collecting them were little understood — governments have frequently thus alienated large branches of the public revenue: tempted by an immediate supply, they either did not or would not regard the extent of the sacrifices they made. The history of French finance is replete with instances of this kind. The customs of Orleans, which were originally purchased by a Duke of Orleans for 60,000 *francs*, afterwards yielded to his posterity a yearly revenue of more than 1,000,000 *francs*.

The venality of offices in that kingdom had created an exceedingly complex, and consequently exceedingly vicious, system. The sale of offices conferring hereditary nobility was especially mischievous, since this nobility enjoyed a multitude of exemptions. The nobles paid no taxes. Hence every creation of nobility was a tax, equal in value to the exemption granted, thrown upon those who continued liable to pay them.

Should the price for which an office is sold form a part of the emoluments of the head of the office, and not be received by the public, this would make no difference in the question of economy as respects giving and selling. That the produce of the sale is afterwards wasted, is an accident unconnected with the sale. The emoluments received by the head of the department may be too large or not: if not too large, the public gains by the operation; since, in suppressing the sale, it would be necessary to increase his emoluments by other means: if too large, the excess might be made applicable to the public service.

The Sale of Offices considered with respect to particular departments.

Public opinion is at present adverse to the sale of public offices. It more particularly condemns their sale in the three great departments of war, law, and religion. This prejudice has probably arisen from the improper use to which it has sometimes been applied; but whether this be the case or not, the use of the word *venal*, seldom if ever but in an odious and dysolgystic sense, has tended to preserve it.

"He who has bought the right of judging will sell judgments," is the sort of reasoning in use upon this subject. Instead of an argument, it is only an epigram.* The members of the French parliaments were judges, and they purchased their places; it did not by any means follow that they were disposed to sell their judgments, or that they could have done so with impunity. The greater number of these parliaments were never even suspected of having sold them. Countries may however be cited, in which the judges sell both justice and injustice, though they have not bought their places. The uprightness of a judge does not depend upon these, but upon other circumstances. If the laws be intelligible and known — if the proceedings of the judges are public — if the punishment for injustice surpass the profit to be reaped from it, judges will be upright, even though they purchase their offices.

In England, there are certain judicial offices which the judges sell—sometimes openly, sometimes clandestinely. The purchasers of these offices extract from the suitors as much as they can: if they had not purchased their places, they would not have endeavoured to extract less. The mischief is, not that this right of plundering is sold, but that the right exists.

* "Vendere jure potest, emerat ille prius." Apply the reasoning to another subject: — "He who has bought apples, will sell apples." The consequence does not follow; for he may chance to eat or to give them away.

In the English army, the system of venality has been adopted. Military commissions, from the rank of ensign to that of lieutenant-colonel, are sold, with permission to the purchasers to re-sell them. The epigram upon the judges is not applied here. The complaint is, that the patrimony of merit is invaded by wealth. But it ought to be recollected, that in this career the opportunities for the display of merit do not occur every day. It is only upon extraordinary occasions that extraordinary talents can be displayed; and when these occur, there can be no difficulty, even under this system, of bestowing proportionate and appropriate rewards. Besides, though the patrimony of merit should by this means be invaded by wealth, it would at the same time be defended from favouritism — a divinity in less esteem even than wealth. The circumstance which ought to recommend the system of venality to suspicious politicians is, that it diminishes the influence of the crown. The whole circle over which it extends is so much reclaimed from the influence of the crown. It may be called a corruption, but it serves as an antidote to a corruption more to be dreaded.

It is the sale of ecclesiastical offices which has occasioned the greatest outcry. It has been made a particular sin, to which has been given the name of *simony*. In the Acts of the Apostles, we are informed that at Samaria there was a magician named Simon, to whose gainful practices an immediate stop was put by the preaching and miracles of Philip, one of the deacons of the church of Jerusalem, who had been driven to Samaria by persecution. Simon, therefore, regarding Philip as a more fortunate rival, enrolled himself among the number of his proselytes, and when the apostles Peter and John came down from Jerusalem, and by the laying on of their hands communicated to the disciples the gift of the Holy Ghost, Simon, desirous of possessing something more than the rest, offered to them money, saying, "Give me also this power, that on whomsoever I lay hands, he may receive the Holy Ghost." Upon which Peter severely reprimanded him; and the magician, supple as he was intriguing, asked forgiveness — and thus his history closes. It is nowhere said that he was punished.

Upon the strength of this story, the Roman Catholic church has converted the act of buying or selling ecclesiastical benefices into a sin; and the English law, copying from the catholic church, has constituted such an act a crime. As the Roman Catholic church, among catholics, is infallible, as to them it must have decided rightly when it declared such acts to be sinful. Our subject, however, leads us only to the consideration of the legal crime: and between this crime and the offence of Simon Magus, there is nothing in common. Presentation to a living, and the reception of the Holy Ghost, are not the same things. If it be the object of this law to exclude improper persons, more direct, simple, and efficacious means might be employed: their qualifications might be ascertained by public examinations; their good conduct by the previous publication of their names, with liberty to all the world to object against them. Their moral and intellectual capacity being thus proved, why should they not be allowed to purchase the employment, or to discharge it gratuitously? An idiot, once admitted to priest's orders, may hold an ecclesiastical benefice; but were a man gifted like an apostle to give five guineas to be permitted to discharge the duties of that benefice, he would be borne down by the outcry against the simony he had committed.

What, then, is the effect of these anti-simoniacal laws? A priest may not purchase a benefice for himself; but his friend, whether priest or layman, may purchase it for him: He may not purchase the presentation to a vacant benefice; but he may purchase the right of presentation to a benefice filled by a dying man, or by a person in good health who will have the complaisance to resign, and receive it again with an obligation again to resign whenever his patron requires it. In reading these self-styled anti-simoniacal laws, it is difficult to discover whether they are intended to prohibit or to allow the practice of simony. Their only real effects are to encourage deception and fraud. Blackstone complains of their inexecution: he did not perceive that a law which is not executed is ridiculous.

CHAPTER X.

OF QUALIFICATIONS.

We have already seen that a salary may be employed as a means of insuring the responsibility of an individual, and as a moral antiseptic to preserve him from the influence of corruption. By the sale of offices, it has been seen that the actual expense of a salary may be diminished, and even reduced to nothing. It is therefore evident that the important circumstance is, that the individual should possess the requisite portion of the precious matter of reward, and not that it should have been given to him. If he possess it of his own, so much the better; and the more he already possesses, the less is it necessary to give him. In England, such are the attractions of power and dignity, that the number of candidates for their possession has been found so large, that it has been thought desirable to limit the selection to the number of those who possess the required quantity of this moral antiseptic; and this circumstance

has given birth to what have been called *qualifications*.

The most remarkable and important offices to which these pecuniary qualifications have been attached, are those of justices of the peace and members of parliament. A justice of the peace ought to possess at least £100 per annum of landed property. There is no reasonable objection against this law. The office is one of those for which an ordinarily liberal education is sufficient. It is at the same time such an office, that the individual invested with it might do much mischief were he not restrained by powerful motives.

As a qualification for the more important office of member of parliament, the law requires of the member for a borough or city a similar qualification of £300 per annum, and of the member for a county of £600 per annum. This case differs widely from the other. Sufficient talent for carrying the laws into execution is possessed by a multitude of individuals; but few are able to determine what laws ought to be framed. The science of legislation is still in its cradle—it has scarcely been begun to be formed in the cabinets of philosophers: among legislators in name, scarcely any other practice can be found than that of children, who in their prattle copy what they have learned of their nurses. That a science may be learned, a motive is necessary; that the science of legislation may be learned, or rather may be created, motives so much the more powerful are necessary, as this science is most repulsive and thorny. For the pursuit of this study, an ardent and persevering mind is required, which can scarcely be expected to be formed in the lap of ease, of luxury, and of wealth. Among those whose wants have been forestalled from their cradle — among those who become legislators to gratify their vanity or relieve their ennui — there can scarcely be found one who could be called a legislator without mockery How shall he who possesses everything without the trouble of thinking, be led to subject himself to the labour of thought? If it be desirable that legislators should be men of enlarged and well-instructed minds, they must be sought among those who possess but little wealth — among those who, oppressed with their insignificance, are stimulated by ambition, and even by hunger, to distinguish themselves; they must be sought among those who possess the habits of Cyrus and not of Sardanapalus. Among the children of luxury, of whom the great mass of senators chosen by a rich people will always be composed, there are but few who will undergo the fatigue of studying the lessons which, at the expense of so much labour, have been furnished them by Beccaria and Adam Smith! Can it be expected, then, that from among their number the rivals of these great masters should be found? Qualifications in this case tend to exclude the individuals endowed with the greatest moral and intellectual capacity.

The reasons, however, in favour of qualifications are plausible. It is alleged, that the possession of a certain property tends to guarantee the independence of its possessor, and that in no other situation is independence more desirable than in that of a deputy appointed to watch over and defend the interests of the people against the encroachments of the executive power, supplied as that power almost necessarily is with so many means of seduction. To this it may be replied, that it is not the poor alone who are liable to be seduced: multitudes possessing property exceeding in value the qualifications required, are biassed by the seductive influence of places and pensions, whilst the poor remain unmoved.

A law of this nature, whose effect, were it strictly executed, would be to exclude the most capable, is made to be evaded, and in fact has constantly been evaded: among those who have acted the most conspicuous parts in the British House of Commons, many have been able to enter there only by an evasion of this law. Means might be provided which would afford a perfect guarantee against such evasions; but happily, upon this, as upon many other occasions, the veil that hides from human weakness the distant inconveniences of bad laws, hides also the means necessary for rendering such laws efficacious.

Some years ago, a member, the honesty of whose intentions could not be doubted, proposed to augment the qualifications for cities and boroughs from £300 to £600 per annum. The proposition, after having made considerable progress, fell to the ground. I know not whether this happened from a conviction of its trifling utility, or from one of those accidents which in that slippery path equally befall the most useful and most mischievous projects.

When the greatest possible freedom is given to popular suffrage, and even when no corrupt influence is used, the popular employment of wealth, being of all species of merit that of which people in general are best qualified to judge, and most disposed to esteem, there naturally exists an aristocracy of wealth. Is it desirable that this aristocracy should be rendered necessary and complete?

CHAPTER XI.

OF TRUST AND CONTRACT MANAGEMENT.

THE capacity of the individuals to discharge the duties required of them having been ascertained, and the most intimate connexion between their interest and the discharge of these duties having been established, the only desirable circumstance remaining is to reduce

the amount of the emoluments to be paid for the discharge of these duties to the lowest term. Suppose the amount expended in the purchase of a given service to be a certain sum, and that an individual equally capable of rendering this service, should offer to render it at less expense: is there any good reason for refusing such an offer? I can discover none. The acceptance of such a proposition is the acceptance of a contract: the service thus agreed to be performed, is said to be contracted for, or let to farm. To this method, the mode of obtaining services by employing commissioners and managers, is opposed.

General reasonings upon this subject are insufficient to determine which of these two opposite systems will be most advantageous in any particular department: the nature of the service must be ascertained, before the question can be decided.

If we confine ourselves to general principles, contracts must be preferred to commissions. Under the system of contracts, the interests about which the individual is employed are his own; whilst, under the system of commissions, the interests about which he is employed remain the interests of the state; that is, the interests of another. In the first case, the sub-functionaries employed are the servants of an individual; in the other, they are the servants of the public — fellow-servants of those who are to watch over them. "But the servants of the most negligent master," says Adam Smith, "are better superintended than the servants of the most vigilant sovereign." If this cannot be admitted as an infallible rule, it is at least more frequently true than otherwise.

Public opinion is, however, but little favourable to the system of contracts. The savings which result to the state are forgotten, whilst the profits reaped by the farmers are recollected and exaggerated. Upon this subject, the ignorant and the philosopher — those who judge without thought, and those who pretend to have examined the subject — are nearly agreed. The objections which they bring forward against contractors (for they relate to individuals rather than to the system) are sufficiently specious.

I. *The contractors are rich.* If they are so, this is not the fault of the system, but of the conditions of the bargain made with them.

II. *The contractors are ostentatious and vain.* And if they burst with vanity, what then? Such inappreciable, or rather imaginary evils, cannot be brought into political calculations Their vanity will find a sufficient counterpoise and punishment in the vanity of those whom they incommode, whilst their ostentation will distribute their wealth among those whom it employs.

III. *The contractors excite envy.* This is the fault of those who are envious, and not of the contractors: it is another imaginary evil, in opposition to which may be placed the pleasure of detraction. Besides, if the contracts are open to all, unless improvident bargains are made through favour, corruption, or ignorance, rapid fortunes will not often be accumulated by contractors: should they still become rich, it will be because they have deserved it.

IV. *Contractors never find the laws too severe to insure the collection of the taxes for which they have contracted. They will procure severe and sanguinary laws to be enacted.* If the laws are severe and sanguinary, the legislature is in fault, and not the contractors. Whether the taxes are managed by contractors or commissioners, it is equally proper that the most efficacious system of laws for their collection should be established; and certainly severe and sanguinary laws are not the most efficacious. Contractors, therefore, are not likely to seek the enactment of the most severe laws: there are many reasons for supposing the contrary will be the case. The better the law is executed, that is to say, the more certainly punishment follows the transgression of the law, the less severe need it be. But under the inspection of the contractor, who has so strong an interest in its execution, the law has a better chance of being put in execution, than when under the inspection of a commissioner who has so little, if any, interest in the matter. Upon this point it is impossible to imagine by what means two interests can be more intimately connected, than those of the contractor and the state. It is the interest of the contractor that all who illegally evade the payment of the taxes should be punished: this also is the interest of the state. But it can never be the interest of the contractor to punish the innocent: this would tend to excite the whole people against him. Of every species of injustice, this is one which is least likely to meet with tranquil and acquiescent spectators.

Adam Smith, who has adopted all these objections, little calculated as they seem to me to appear in such a work as his, also contends that "the best and most frugal way of levying a tax, can never be by farm."* If this were true, it would be a conclusive reason against ever letting taxes to farm, and it would be useless to seek for others. When a fact is proved, it is useless to trouble one's-self with prejudices and probabilities.

It is true, that without the hope of gain, no contractor would undertake to collect the produce of a tax, and to make the advances required. But whence ought the profit of the farmer to rise? This is what Adam Smith has not examined. He supposes that the state would make the same profit, by

* Wealth of Nations, book v. ch. ii.

establishing an administration under its own inspection. The truth of this supposition is altogether doubtful. The personal interest of a minister is to have as many individuals, that is to say, as many dependants, employed under him as possible — that their salaries should be as large as possible; and he will lose nothing by their negligence. The interest of the farmer, or contractor, is to have as few individuals employed under him as possible, and to pay each one no more than he deserves; and he will lose by every instance of their negligence. In these circumstances, though no greater amount should be received from the people than would have been collected by the state, a contractor might reasonably hope to find a source of profit.

Adam Smith has attacked, with as much force as reason, the popular prejudices against the dealers in corn, so odious and so much suspected under the name of forestallers. He has shown that the interest of the public is most intimately connected with the natural, and almost necessary, interests of this suspected class of merchants. He might with equal justice have extended his protection to farmers of the public revenue, a class of men nearly as little beloved.

In every branch of politics, and especially in so wide a field as his subject embraced, it was nearly impossible that he should examine everything with his own eyes: it was almost of necessity that he was sometimes guided by general opinion. This seems to me to have happened upon this occasion. He forgot in this instance to apply the principle already cited, and of which he had elsewhere made such beautiful applications. I had myself once written an essay against farmers of the revenue; I have thrown it into the fire, for which alone it was fit. I know not how long I should have retained the opinions it advocated, had I not been better instructed by Adam Smith.

Note.—In Burgoyne's "Picture of Spain," vol. ii. page 4, &c. it is stated, that in that country, trust was found more economical than contract management. But he does not state in what manner contracts were granted: whether favour or corruption did not preside at their disposal; whether the trust management had not superior means of enforcing the payment of the taxes; nor whether their increased produce was not, in part at least, owing to the increase of trade and wealth.

CHAPTER XII.

OF REFORMS.

THE emoluments annexed to any office being shown to be in excess, and the mischiefs resulting from such an excess being ascertained, the next question which occurs is, What remedy ought to be applied? The most obvious answer is a short one: Strike them off at once. But thus unqualified, this answer is far from being the proper one.

Reform is the practical conclusion expected as the reward for all the labour bestowed on the examination of these theoretic propositions. Upon this subject, nothing farther remains but to point out one limitation, without which every reform can only be a greater abuse than the whole of those which it pretends to correct. This limitation is, *that no reform ought to be carried into effect without granting complete indemnity to those whose emoluments are diminished, or whose offices are suppressed*; — in a word, that the only legitimate benefit to be derived by the public from economical reform, consists in the conversion of perpetual into life annuities.

Will it be said, that the immediate suppression of these offices would be a gain to the public? This would be a mere sophism. The sum in question would, without doubt, be gained by the public, if it came from abroad, if it were obtained by commerce &c.; but it is not gained when it is taken from individuals who form a part of that same public. Would a family be richer, because the father disinherited one of his children, that he might the more richly endow the others? In this instance, as the disinheriting of one child would increase the inheritance of the others, the mischief would not be without some countervailing advantage; it would be productive of good to some part of the family. But when it relates to the public, the emoluments of a suppressed place being divided amongst the whole community,—the gain, being distributed among a multitude, is divided into impalpable quantities; whilst the loss, being confined to one, is felt in its entirety by him who supports it alone. The result of the operation is in no respect to enrich the party who gains, whilst it reduces the party who loses to poverty. Instead of one place suppressed, suppose a thousand, or ten thousand, or a hundred thousand,—the total disadvantage will remain the same: the plunder taken from thousands will have to be distributed among millions; your public places will be filled with unfortunate citizens whom you will have plunged into indigence, whilst you will scarcely see one individual who is sensibly enriched in consequence of all these cruel operations. The groans of sorrow and the cries of despair will resound on every side; the shouts of joy, if any such are heard, will not be the expressions of happiness, but of that malevolence which rejoices in the agony of its victims.

By what means do individuals deceive themselves and others into the sanction of

such mischievous acts? It is by having recourse to certain vague maxims, consisting of a mixture of truth and falsehood, and which give to a question, in itself simple, an appearance of deep and mysterious policy. The interest of individuals, it is said, must give way to the public interest. But what does this mean? Is not one individual as much a part of the public as any other? This public interest, which is thus personified, is only an abstract term; it only represents the aggregate of individual interests: they must all be taken into the account, instead of considering a part as the whole, and the rest as nothing. If it were proper to sacrifice the fortune of one individual to augment that of the others, it would be still more desirable to sacrifice a second and a third, and so on to any greater number, without the possibility of assigning limits to the operation; since, whatever number may have been sacrificed, there still remains the same reason for adding one more. In a word, the interest of the first is sacred, or the interest of no one can be so.

The interests of individuals are the only real interests. Take care of individuals;—never molest them—never suffer them to be molested, and you have done enough for the public.

Among the multiplicity of human affairs, individuals have often been injured by the operation of particular laws, without daring to complain, or without being able to obtain a hearing for their complaints, on account of this vague and false notion, that the interest of individuals ought to give way to the public interest. Considered as a question of generosity, by whom ought this virtue to be displayed? By all towards one—or by one towards all? Which, then, is the most selfish—he who would preserve what he already possesses—or he who would seize, even by force, what belongs to another?

An evil felt, and a good unfelt,—such is the result of those magnificent reforms, in which the interests of individuals are sacrificed to those of the public.

The principles here laid down, it may be said, are applicable to offices and pensions held *for life*, but not to offices and pensions held *during pleasure*, and which consequently may be revoked at any time. May not these be reformed at any time? No: the difference between the two is only verbal. In all those cases in which it has been customary for those places which are granted *during pleasure* to be held for life, though the possessor may have been led to expect other causes of removal, he has never expected this. "My superior," he has said to himself, "may dismiss me, I know; but I flatter myself I shall never deserve to be dismissed; I shall therefore retain my office for life." Hence the dismission of such an individual without indemnity, is as great an evil, as much unforeseen, and equally unjust, as in the former case.

To these reasons, arising from justice and humanity, may be added a prudential consideration. By such indemnification, the interests of individuals and the public are reconciled, and a better chance of securing the latter is obtained. Assure those who are interested that they shall not be injured,—they will be among the foremost in facilitating reforms. By thus removing the grand obstacle of contrary interests, the politician prevents those clandestine intrigues, and private solicitations, which so often arrest the progress of the noblest plans.

It was thus that Leopold, the Grand Duke of Tuscany, proceeded. "Notwithstanding the multitude of reforms introduced by his Royal Highness since his accession to the throne, there has not been a single office reformed in Tuscany, the holder of which has not either been placed in some other office, [*equal to that suppressed, must be understood*] or who has not received as a pension a salary equal in value to the emoluments of his office."* Upon such conditions, the pleasure of reform is pure: nothing is hazarded; good only is accomplished; at least the principal object is secured, and the happiness of no one is interrupted.

* "Indication Sommaire des Réglemens de Léopold, Grand Duc de Toscane." Bruxelles, 1778.

BOOK III.—REWARD APPLIED TO ART AND SCIENCE.

CHAPTER I.

ART AND SCIENCE—DIVISIONS.

A cloud of perplexity, raised by indistinct and erroneous conceptions, seems at all times to have been hanging over the import of the terms *art* and *science*. The common supposition seems to have been, that in the whole *field of thought* and *action*, a determinate number of existing compartments are assign-

able, marked out all round, and distinguished from one another by so many sets of natural and determinate boundary lines: that of these compartments some are filled, each by an *art*, without any mixture of science; others by a *science*, without any mixture of art; and others, again, are so constituted, that, as it has never happened to them hitherto, so neither can it ever happen to them in future, to contain in them any thing *either* of art *or* science.

This supposition will, it is believed, be found in every part erroneous: as between *art* and *science*, in the whole field of *thought* and *action*, no one spot will be found belonging to either to the exclusion of the other. In whatsoever spot a portion of either is found, a portion of the other may be also seen; whatsoever spot is occupied by either, is occupied by both — is occupied by them in *joint tenancy*. Whatsoever spot is thus occupied, is so much taken out of the *waste;* and there is not any determinate part of the whole waste which is not liable to be thus occupied.

Practice, in proportion as *attention* and *exertion* are regarded as necessary to due *performance*, is termed *art*. *Knowledge*, in proportion as *attention* and *exertion* are regarded as necessary to *attainment*, is termed *science*.

In the very nature of the case, they will be found so combined as to be inseparable. Man cannot *do* anything well, but in proportion as he *knows* how to *do* it: he cannot, in consequence of *attention* and *exertion*, *know* anything but in proportion as he has practised the *art* of *learning* it. Correspondent, therefore, to every *art*, there is at least one branch of *science;* correspondent to every branch of *science*, there is at least one branch of *art*. There is no determinate line of distinction between *art* on the one hand, and *science* on the other; no determinate line of distinction between *art* and *science* on the one hand, and *unartificial practice* and *unscientific knowledge* on the other. In proportion as that which is seen to be *done*, is more conspicuous than that which is seen or supposed to be *known*, — that which has place is apt to be considered as the work of *art:* in proportion as that which is seen or supposed to be *known*, is more conspicuous than anything else that is seen to be *done*, — that which has place is apt to be set down to the account of *science*. Day by day, acting in conjunction, art and science are gaining upon the above-mentioned waste — the field of *unartificial practice* and *unscientific knowledge*.* Taken collectively, and considered in their connexion with the happiness of society, the arts and sciences may be arranged in two divisions; viz. — 1. Those of amusement and curiosity; 2. Those of utility, immediate and remote. These two branches of human knowledge require different methods of treatment on the part of governments.

By arts and sciences of amusement, I mean those which are ordinarily called the *fine arts;* such as music, poetry, painting, sculpture, architecture, ornamental gardening, &c. &c. Their complete enumeration must be excused: it would lead us too far from our present subject, were we to plunge into the metaphysical discussions necessary for its accomplishment. Amusements of all sorts would be comprised under this head.

Custom has in a manner compelled us to make the distinction between the arts and sciences of amusement, and those of curiosity. It is not, however, proper to regard the former as destitute of utility: on the contrary, there is nothing, the utility of which is more incontestable. To what shall the character of utility be ascribed, if not to that which is a source of pleasure? All that can be alleged in diminution of their utility is, that it is limited to the excitement of pleasure: they cannot disperse the clouds of grief or of misfortune. They are useless to those who are not pleased with them: they are useful only to those who take pleasure in them, and only in proportion as they are pleased.

By arts and sciences of curiosity, I mean those which in truth are pleasing, but not in the same degree as the fine arts, and to which at the first glance we might be tempted to refuse this quality. It is not that these arts and sciences of curiosity do not yield as much pleasure to those who cultivate them as the fine arts; but the number of those who study them is more limited. Of this nature are the sciences of heraldry, of medals, of pure chronology — the knowledge of ancient and barbarous languages, which present only collections of strange words, — and the study of antiquities, inasmuch as they furnish no instruction applicable to morality, or any other branch of useful or agreeable knowledge.

The utility of all these arts and sciences, — I speak both of those of amusement and curiosity, — the value which they possess, is exactly in proportion to the pleasure they yield. Every other species of pre-eminence which may be attempted to be established among them is altogether fanciful. Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either. Everybody can play at push-pin: poetry and music are relished only by a few. The game of push-pin is always innocent: it were well could the same be always asserted of poetry. Indeed, between poetry and truth there is a natural opposition: false morals, fictitious nature. The poet always stands in need of

† The foregoing paragraphs are extracted from Bentham's "*Chrestomathia*," Part I.

something false. When he pretends to lay his foundations in truth, the ornaments of his superstructure are fictions; his business consists in stimulating our passions, and exciting our prejudices. Truth, exactitude of every kind, is fatal to poetry. The poet must see everything through coloured media, and strive to make every one else to do the same. It is true, there have been noble spirits, to whom poetry and philosophy have been equally indebted; but these exceptions do not counteract the mischiefs which have resulted from this magic art. If poetry and music deserve to be preferred before a game of push-pin, it must be because they are calculated to gratify those individuals who are most difficult to be pleased.

All the arts and sciences, without exception, inasmuch as they constitute innocent employments, at least of time, possess a species of moral utility, neither the less real or important because it is frequently unobserved. They compete with, and occupy the place of those mischievous and dangerous passions and employments, to which want of occupation and ennui give birth. They are excellent substitutes for drunkenness, slander, and the love of gaming.*

The effects of idleness upon the ancient Germans may be seen in Tacitus. His observations are applicable to all uncivilized nations: for want of other occupations they waged war upon each other — it was a more animated amusement than that of the chase. The chieftain who proposed a martial expedition, at the first sound of his trumpet ranged under his banners a crowd of idlers, to whom peace was a condition of restraint, of languor, and of ennui. Glory could be reaped only in one field — opulence knew but one luxury. This field was that of battle — this luxury that of conquering or recounting past conquests. Their women themselves, ignorant of those agreeable arts which multiply the means of pleasing, and prolong the empire of beauty, became the rivals of the men in courage, and, mingling with them in the barbarous tumult of a military life, became unfeeling as they.

It is to the cultivation of the arts and sciences, that we must in great measure ascribe the existence of that party which is now opposed to war: it has received its birth amid the occupations and pleasures furnished by the fine arts. These arts, so to speak, have enrolled under their peaceful banners that army of idlers which would have otherwise possesssd no amusement but in the hazardous and bloody game of war.

Such is the species of utility which belongs indiscriminately to all the arts and sciences. Were it the only reason, it would be a sufficient reason for desiring to see them flourish and receive the most extended diffusion.

If these principles are correct, we shall know how to estimate those critics, more ingenious than useful, who, under pretence of purifying the public taste, endeavour successively to deprive mankind of a larger or smaller part of the sources of their amusement. These modest judges of elegance and taste consider themselves as benefactors to the human race, whilst they are really only the interrupters of their pleasure — a sort of importunate hosts, who place themselves at the table to diminish, by their pretended delicacy, the appetite of their guests. It is only from custom and prejudice that, in matters of taste, we speak of false and true. There is no taste which deserves the epithet *good*, unless it be the taste for such employments which, to the pleasure actually produced by them, conjoin some contingent or future utility: there is no taste which deserves to be characterized as bad, unless it be a taste for some occupation which has a mischievous tendency.

The celebrated and ingenious Addison has distinguished himself by his skill in the art of ridiculing enjoyments, by attaching to them the fantastic idea of *bad taste*. In the *Spectator* he wages relentless war against the whole generation of *false* wits. Acrostics, conundrums, pantomimes, puppet-shows, *bouts-rimés*, stanzas in the shape of eggs, of wings, burlesque poetry of every description — in a word, a thousand other light and equally innocent amusements, fall crushed under the strokes of his club. And, proud of having established his empire above the ruins of these literary trifles, he regards himself as the legislator of Parnassus! What, however, was the effect of his new laws? They deprived those who submitted to them, of many sources of pleasure — they exposed those who were more inflexible, to the contempt of their companions.

Even Hume himself, in spite of his proud and independent philosophy, has yielded to this literary prejudice. "By a single piece," says he, "the Duke of Buckingham rendered a great service to his age, and was the reformer of its taste!" In what consisted this important service? He had written a comedy, *The Rehearsal*, the object of which was to render those theatrical pieces which had been most popular, the objects of general distaste. His satire was completely successful; but what was its fruit? The lovers of that species of amusement were deprived of so much pleasure; a multitude of authors, covered with ridicule and contempt, deplored, at the same time, the loss of their reputation and their bread.

As the amusement of a minister of state

* *Principles of Penal Law*, Part III. *Of Indirect Methods of preventing Crimes*, Vol. I. p. 533.

it must be confessed that a more suitable one might be found than a game at *solitaire*. Still, among the number of its amateurs was once found Potemkin, one of the most active and respected Russian ministers of state. I see a smile of contempt upon the lips of many of my readers, who would not think it strange that any one should play at cards from "eve till morn," provided it were in company. But how incomparably superior is this solitary game to many social games — so often anti-social in their consequences! The first, a pure and simple amusement, stripped of everything injurious, free from passion, avarice, loss, and regret. It is gaming enjoyed by some happy individuals, in that state in which legislators may desire, but cannot hope that it will ever be enjoyed by all throughout the whole world. How much better was this minister occupied, than if, with the Iliad in his hand, he had stirred up within his heart the seeds of those ferocious passions which can only be gratified with tears and blood.

As men grow old, they lose their relish for the simple amusements of childhood. Is this a reason for pride? It may be so — when to be hard to please, and to have our happiness dependent on what is costly and complicated, shall be found to be advantageous. The child who is building houses of cards is happier than was Louis XIV. when building Versailles. Architect and mason at once, master of his situation and his materials, he alters and overturns at will.

"Diruit, edificat, mutat quadrata rotundis:"

and all this at the expense neither of groans nor money. The proverbial expression of the *games of princes*, may furnish us with strong reasons for regretting that princes should ever cease to love the *games of children*.

A reward was offered by one of the Roman emperors to whoever would invent a new pleasure; and because this emperor was called *Nero*, or *Caligula*, it has been imputed to him as a crime: as if every sovereign, and even every private individual, who encourages the cultivation of the arts and sciences, were not an accomplice in this crime. The employment of those critics, to whom we have before referred, tends to diminish the existing stock of our pleasures: the natural effect of increasing years, is to render us insensible to those which remain: by those who blame the offer of the Roman emperor, these critics should be esteemed the benefactors of mankind, and old age the perfection of human life.

In league with these critics are the tribe of satirists — those generous men, who without other reward than the pleasure of humbling and disfiguring everything which does not please them, have constituted themselves reformers of mankind! The only satire I could read without disgust and aversion, would be a satire on these libellers themselves. Their occupation consists in fomenting scandal, and in disseminating its poisons throughout the world, that they may be furnished with pretexts for pouring contempt upon everything that employs or interests other men. By blackening everything and exaggerating everything (for it is by exaggeration they exist) they deceive the judgments of their readers: — innocent amusements, ludicrous eccentricities, venial transgressions and crimes, are alike confounded and covered with their venom. Their design is to efface all the lines of demarcation, all the essential distinctions which philosophy and legislation have with so much labour traced. For one truth, we find a thousand odious hyperboles in their works. They never cease to excite malevolence and antipathy: under their auspices, or at least under the influence of the passions which animate them, language itself becomes satirical. Neutral expressions can scarcely be found to designate the motives which determine human actions: to the words expressive of the motive, such as *avarice*, *ambition*, *pride*, *idleness*, and many others, the idea of disapprobation is so closely, though unnecessarily, connected, that the simple mention of the motive implies a censure, even when the actions which have resulted from it have been most innocent. The nomenclature of morals is so tinctured with these prejudices, that it is not possible, without great difficulty and long circumlocutions, simply and purely, without reprobation or approbation, to express the motives by which mankind are governed. Hence our languages, rich in terms of hatred and reproach, are poor and rugged for the purposes of science and of reason. Such is the evil created and augmented by satiric writers.*

Among rich and prosperous nations, it is not necessary that the public should be at the expense of cultivating the arts and sciences of amusement and curiosity. Individuals will always bestow upon these that portion of reward which is proportioned to the pleasure they bestow.

Whilst as to the arts and sciences of immediate and those of more remote utility, it would not be necessary, nor perhaps possible, to preserve between these two classes an exact line of demarcation, the distinctions of theory and practice are equally applicable to all. Considered as matter of theory, every art or science, even when its practical utility is most immediate and incontestable, appears to retire into the division of arts and sciences of remote utility. It is thus that medicine and legislation, arts so truly practical, considered under a particular aspect, appear equally remote in respect to their utility with the spe-

* See further on this subject, in the "*Table of Springs of Action*," Vol. I. p. 195.

culative sciences of logic and mathematics. On the other hand, there is a branch of science for which, at first, a place would scarcely have been found among the arts and sciences of curiosity, but which, cultivated by industrious hands, has at length presented the characters of immediate and incontestable utility. — Electricity, which, when first discovered, seemed destined only to amuse certain philosophers by the singularity of its phenomena, has at length been employed with most striking success in the service of medicine, and in the protection of our dwellings against those calamities, for which ignorant and affrighted antiquity could find no sufficient cause but the special anger of the gods.

That which governments ought to do for the arts and sciences of immediate and remote utility, may be comprised in three things — 1. To remove the discouragements under which they labour; 2. To favour their advancement; 3. To contribute to their diffusion.

CHAPTER II.

ART AND SCIENCE — ADVANCEMENT.

Though discoveries in science may be the result of genius or accident, and though the most important discoveries may have been made by individuals without public assistance, the progress of such discoveries may at all times be materially accelerated by a proper application of public encouragement. The most simple and efficacious method of encouraging investigations of *pure theory*—the first step in the career of invention, consists in the appropriation of specific funds to the researches requisite in each particular science.

It may, at first sight, appear superfluous to recommend such a measure as this, since there are few states which have not sometimes made such appropriations, and since all governments, in proportion as they have become enlightened, have been more and more disposed to reckon such expenses necessary. The most efficacious methods of employing the large funds which ought thus to be appropriated, remain, however, to be examined.

It would be necessary that the funds applicable to a given science — chemistry, for example — should be confided to the students of chemistry themselves. They ought, however, to be bestowed in the shape of reward. Thus the chemist, who upon a given subject should have produced the best theoretic dissertation, might be put into possession of these funds, upon condition that he should employ them in making the experiments which he had pointed out. What more natural or useful reward could be conferred upon a philosopher, than thus to be enabled, with honour to himself, to satisfy a taste or a passion which the insufficiency of his own fortune would have rendered rather a torment than a pleasure? His talents are rewarded by giving him new means of increasing them. Other rewards often have a contrary effect: they tend to distract his attention, and to give birth to opposite tastes.

If this method of encouraging theoretic researches has been neglected, it has been because the intimate connexion between the sciences and arts — between theory and practice — has only been well understood by philosophers themselves; the greater number of men recognise the utility of the sciences only at a moment when they are applied to immediate use. The ignorant are always desirous of humbling the wise; gratifying their self-love, by accusing the sciences of being more curious than useful. "All your books of natural history are very pretty," said a lady to a philosopher, "but you have never saved a single leaf of our trees from the teeth of the insects." Such is the frivolous judgment of the ignorant. There are many discoveries which, though at first they might seem useless in themselves, have given birth to thousands of others of the greatest utility. It is in conducting the sciences to this point, that encouragements might thus be advantageously employed, instead of being bestowed in what are generally called rewards. When the discoveries of science can be practically employed in the increase of the mass of general wealth, they receive a reward naturally proportioned to their utility: it is therefore for such discoveries as are not thus immediately applicable, that reward is most necessary. Of this nature are most of the discoveries of chemistry. Is a new earth discovered? — a new air — a new salt — a new metal? The utility of the discovery is at first confined to the pleasure experienced by those interested in such researches. This ordinarily is all the benefit reaped by the discoverer: occupied in making further discoveries, he leaves it to others to reap their fruits. It is those who follow him, who apply them to the purposes of art, and levy contributions upon the individuals, who are desirous of enjoying the fruits of his labour. Ought the master workman, who sees no particular individual upon whom he may levy a contribution, therefore to go without reward?

CHAPTER III.

ART AND SCIENCE — DIFFUSION.

The sciences, like plants, may expand in two directions — in superficies and in height. The superficial expansion of those sciences which are most immediately useful, is most to be desired. There is no method more calculated to accelerate their advancement, than their

general diffusion: the greater the number of those by whom they are cultivated, the greater the probability that they will be enriched by new discoveries. Fewer opportunities will be lost, and greater emulation will be excited in their cultivation.

Suppose a country divided into districts, somewhat similar to the English counties, but more equal in size, say from thirty to forty miles in diameter, — the following is the system of establishments which ought to be kept up in the central town of each district: —

1. A professor of medicine.
2. A professor of surgery and midwifery.
3. An hospital.
4. A professor of the veterinary art.
5. A professor of chemisty.
6. A professor of mechanical and experimental philosophy.
7. A professor of botany and experimental horticulture.
8. A professor of the other branches of natural history.
9. An experimental farm.

The first advantage resulting from this plan would be the establishment, in each district, of a practitioner skilled in the various branches of the art of healing. An hospital, necessary in itself, would also be further useful by serving as a school for the students of this art.

The veterinary art, or the art of healing as applied to animals, has only within these few years been separately studied in England. The farriers who formerly practised upon our cattle, were generally no better qualified for their duty than the old women whom our ancestors allowed to practise upon themselves. The establishment of a professor of the veterinary art in every district might even be recommended as a matter of economy: the value of the cattle preserved would more than counterbalance the necessary expense. This professorship might, for want of sufficient funds, be united to one of the others.

The connexions of chemistry with domestic and manufacturing economy are well known. The professor of this science would of course direct his principal attention to the carrying this practical part to its greatest perfection. His lectures would treat of the business of the dairy; the preservation of corn and other agricultural productions; the preservation of provisions of all sorts; the prevention of putrefaction, that subtle enemy of health as well as of corruptible wealth; the proper precautions for guarding against poisons of all sorts, which may so easily be mingled with our provisions, or which may be collected from the vessels in which they are prepared. They would also treat of the various branches of trade — of the arts of working in metal, of breweries, of the preparation of leather, and the manufactures of soap and candles, &c. &c.

Botany, to a certain degree, is necessary in the science of medicine: it supplies a considerable part of the materials employed. It has a similar connexion with chemistry, and the arts which depend upon it. The combined researches of the botanist and chemist would increase our knowledge of the various uses to which vegetable substances might be applied. It is to them that we must look for the discovery of cheaper and better methods, if such methods are to be found, of giving durability and tenacity to hemp and flax for the manufacture of linens, ropes, and paper; for discoveries respecting the astringent matters applicable to the preparation of leather; and for the invention of new dyes, &c.; and so on, to infinity. Indeed, it is the botanist who must enable the agriculturist to distinguish the most useful and excellent herbs and grasses, from those which are less useful, or pernicious.

The professor of natural history would also furnish abundance not only of curious but useful information. He would teach the cultivator to distinguish, throughout all the departments of the animal kingdom, his allies from his enemies. He would point out the habits and the different shapes assumed by different insects, and the most efficacious methods of destroying them, and preventing their ravages. It might, however, perhaps appear, were we fully acquainted with the history of all the animals which dwell with us upon the surface of this planet, that there would be found none whose existence was to us a matter of indifference.

I have placed in the last rank the institution of an experimental farm — not because its utility would be inferior to all the others, but because its functions may be easily supplied by individual industry. In a country so well replenished with knowledge, wealth, and zeal, as England, there is no district which could not furnish an abundance of experiments in this department. Little more would be necessary than to provide a register into which they might be collected, and in which they might receive the degree of publicity necessary for displaying their utility. Such a register England once possessed in the work of the enlightened and patriotic Arthur Young. Such a register, numerous and excellent as the hints dispersed throughout it were, was far, however, from supplying the place, and rendering useless a system of regular and connected researches, in which instruction should constitute the sole object.*

In enumerating the branches of knowledge with which, on account of their superior uti-

* *The Board of Agriculture*, which at the solicitation of Sir John Sinclair was formed during the administration of Mr. Pitt, was designed to carry purposes similar to those recommended above into effect.

lity, it is most desirable that the great mass of the people should be acquainted, it may well be supposed that I ought not to forget the knowledge of the laws. But that this knowledge may be diffused, a determinate system of cognoscible laws, capable of being known, is necessary. Unhappily, such a system does not yet exist: whenever it shall come to be established, the knowledge of the laws will hardly be considered worthy of the name of science. The legislator who allows more intelligible terms to exist within the compass of language, than those in which he expresses his laws, deserves the execration of his fellow-men. I have endeavoured to present to the world the outlines of a system,* which, should it ever be filled up, I flatter myself would render the whole system of laws cognoscible and intelligible to all.

As to those arts and sciences which may be learned from books, — such as the art of legislation, history in all its branches, moral philosophy and logic, comprehending metaphysics, grammar, and rhetoric, — these may be left to be gathered from books. Those individuals who are desirous of alleviating the pains of study by the charms of declamation upon these subjects, may be permitted to pay for their amusements. There is, however, one branch of encouragement, which the hand of government might extend even to these studies. It might establish in each district, in which the lectures of which we have already spoken, should be delivered, an increasing library, appropriated to these studies. This would be at once to bestow upon students the instruments of study, and upon authors their most appropriate reward.

I should not consider knowledge in these departments, at once so useful and so curious, ill acquired, were it even acquired at the expense of Latin and Greek — an acquaintance with which is held in such high estimation in our days, and for instruction in which the foundations are so abundant. Common opinion appears to have considered the sciences more difficult of attainment than these dead languages. This opinion is only a prejudice, arising from the comparatively small number of individuals who apply themselves to the study of the sciences, and from its not having been the custom to study them till the labour of these other studies has been completed. But, custom and prejudice apart, it is in the study of the sciences that young people would find most pleasure and fewest difficulties. In this career, ideas find easy access through the senses to the memory and the other intellectual faculties. Curiosity, that passion which even in infancy displays so much energy, would here be continually gratified. In the study of language, on the contrary, all is abstraction: there are no sensible objects to relieve the memory; all the energy of the mind is consumed in the acquisition of words, of which neither the utility nor the application is visible. Hence, the longest and most detailed course of instruction which need be given upon all the sciences before mentioned, would not together occupy so much time as is usually devoted to the study of Latin, which is forgotten almost as soon as learned. The knowledge of languages is valuable only as a means of acquiring the information which may be obtained from conversation or books. For the purposes of conversation, the dead languages are useless; and translations of all the books contained in them may be found in all the languages of modern Europe. What, then, remains to be obtained from them, not by the common people, but even by the most instructed? I must confess, I can discover nothing but a fund of allusions wherewith to ornament their speeches, their conversations, and their books — too small a compensation for the false and narrow notions which custom continues to compel us to draw from these imperfect and deceptive sources. To prefer the study of these languages to the study of those useful truths which the more mature industry of the moderns has placed in their stead, is to make a dwelling-place of a scaffolding, instead of employing it in the erection of a building: it is as though, in his mature age, a man should continue to prattle like a child. Let those who are pleased with these studies continue to amuse themselves; but let us cease to torment children with them, at least those children who will have to provide for their own subsistence, till such time as we have supplied them with the means of slaking their thirst for knowledge at those springs where pleasure is combined with immediate and incontestable utility.

It is especially by a complete course of instruction, that the clergy, who might be rendered so useful, ought to be prepared for their functions. Within the narrow limits of every parish, there would then be found one man at least well instructed upon all subjects with which acquaintance is most desirable. In exchange for this knowledge, which constitutes the glory of man, I would exchange as much as might be desired of that controversy which is his scourge and his disgrace.

The intervals between divine service on the Sabbath might then be filled up by the communication of knowledge to those whose necessary avocations leave them no other leisure time for improvement. An attendance upon a course of physico-theology, it appears to me, would be a much more suitable mode of employing this time, than wasting it in that idleness and dissipation in which both health and money are so frequently lost.

* See *An Introduction to Principles of Morals and Legislation*, Vol. I.

There are three causes which tend to strengthen an attachment to the dead languages:—The first is, the utility which they formerly possessed. At the revival of letters, there was nothing to learn but Latin and Greek, and nothing could be learnt but by Latin and Greek. The period when this utility ceased having never been fixed, custom has led us to regard it as still subsisting.

A second reason is, the time and trouble expended by so many persons in learning them.

The price of anything is regulated not only by its utility, but also by the labour expended in procuring it. Few would be willing to acknowledge that they had spent a large portion of their life in learning that which, when learnt, was not worth knowing. There are many individuals who have learnt Latin and Greek, but have learned nothing else. Can it be expected that they should acknowledge these languages are useless? As well might a knight-errant have been expected to acknowledge that his mistress was ugly!*

The third cause is, their reputed necessity. This necessity, though purely conventional, is not the less real. Public opinion has attached a degree of importance to an acquaintance with them, and he who should be known to be entirely ignorant of them, would be branded with disgrace. So long as this law subsists, it must be obeyed. A single individual is seldom able to withstand or change the laws established by public opinion.

As the public mind becomes enlightened, these laws will change of themselves. A sovereign may, however, hasten these changes if he believe them useful, and if he consider the attempt worth the trouble. He may reward individuals for teaching the arts and sciences, and thus establish a new public opinion, which shall at first compete with, and at length ultimately subdue, the previous prejudice.

He may also attain the same end by another less costly, but more startling method. He may prescribe an attendance upon different scientific lectures, as a necessary condition to the holding of certain offices, and particularly of all honorary employments. To those who have completed their course of attendance, an honorary diploma may be given, which upon all occasions of public ceremony shall entitle those who possess it to a certain precedence.

In the times of feudal barbarism, when war was the only occupation of those who did not belong to the commonality or the clergy, the upper ranks in society were necessarily military. The knight was the warrior who could afford to fight on horseback; the squire was one who, not being so rich as the knight, could afford to be his principal attendant. and this constituted their nobility.

In future times, when other occupations shall be pursued and other manners established, it is possible that knowledge may confer rank in Europe, as the appearance of it has for a long time past in China. Wealth, independently of any convention, possesses real power, and will always mingle with everything which tends to confer respect. The philosopher, to his title of honour, will unite the idea of an individual sufficiently wealthy to have supported the expense of a learned education. Knowledge, whether true or presumptive, might thus become a mark of distinction, as the length of the nails is in China.

But it may be said, that something more than attendance upon à course of scientific lectures is necessary, if anything is to be learned; and that the law which should bestow honour upon attendance would not insure study. If it were necessary to have a nobility composed of real philosophers, other methods must be pursued; but when the object in view is merely to change the species of knowledge in which they are to be instructed, from what is useless to what is useful, what more need be required? When interesting objects of study are substituted for those which are uninteresting, they would not study less.

I know that public examinations are powerful means for exciting emulation, but I have no desire to place additional obstacles in the

* "En effet, la plupart de ces savans ne sentent plus les choses en elles-mêmes. Ils sont comme ces imaginations faibles, qui, subjuguées par l'éclât des dignités et des richesses, admirent dans la bouche d'un grand ce qu'ils trouveraient pitoyable dans celle d'un homme du commun. Ainsi, l'ancienne réputation et les langues savantes leur imposent, et changent tout à leurs yeux. Telle pensée qu'ils entendent tout les jours en François sans y prendre garde, les enlève s'ils viennent à la rencontrer dans un auteur Grec. Tout pleins qu'ils en sont, ils vous la citent avec emphase; et si vous ne partagez pas leur enthousiasme, Ah! s'écrient-ils, si vous saviez le Grec! Il me semble entendre le héros de Cervantes, qui, parcequ'il est armé chevalier, voit des enchanteurs où son écuyer ne voit que des moulins.

"Tel est l'inconvénient ordinaire de l'érudition, et il n'y a que les esprits du premier ordre qui puissent l'éviter. L'ignorance, me dira-t-on, n'a-t-elle pas aussi ses inconvéniens? Oui, sans doute; mais on a tort d'appeler ignorans ceux mêmes qui ne sauraient ni Grec ni Latin. Ils peuvent même avoir acquis en François toutes les idées nécessaires pour perfectionner leur raison, et toutes les expériences propres à assurer leur goût. Nous avons des philosophes, des orateurs, des poetes: nous avons même des traducteurs où l'on peut puiser toutes les richesses anciennes, dépouillées de l'orgueil de les avoir récueillies dans les originaux. Un homme qui, sans Grec et sans Latin, aurait mis à profit tout ce qui s'est fait d'excellent dans notre langue, l'emporterait sans dout sur le savant qui, par un amour déréglé des anciens, auroit dédaigné les ouvrages modernes.—*La Mothe, Réflexions sur la Critique*, p. 148.

way of a plan whose novelty alone would render it but too alarming: a project, which to many will appear romantic, need not be accompanied by an accessory whose aspect is alarming, and whose utility is problematic.

The most stupid and inattentive could scarcely attend upon a long course of instruction without gaining some advantage: they would at least be familiarized with the terms of art, which constitute not only the first, but the greatest difficulty; they would form some idea of the principal divisions of the country they traversed; and should they ever be desirous of directing a more particular examination to any particular division, they will at least know in what direction to seek for it. As all the world would then be occupied with the study of the sciences, they would pretend thus to employ themselves, and would be ashamed to be entirely ignorant of those things which were the subjects of general conversation.

Russia is an instance of the ease with which a new direction may be given to the opinions of a whole people. Nobility of birth is but little respected; — official rank is the only ground of distinction. This change has been effected by a few simple regulations. Unless he be an officer, no individual, how rich or nobly born soever he may be, can vote, or even sit, in the assembly of the nobility. The consequence has been, that all classes have pressed into the service of the state. If they do not intend to make it their profession, they quit it when they have attained the rank which confers this privilege.

Note. — If Mr. Bentham had consented to revise his MSS., which were written more than forty years ago, he might have seen reason to alter many of his observations.

In England, much has been done in the interval. Public opinion has sensibly changed respecting the value of classical learning. It is highly esteemed at college, but elsewhere it is now only considered as an accessary: the most enlightened parents regret that it is still the only object of instruction in our public schools.

Since the establishment of the *Royal Institution*, many similar institutions have been formed, and a general desire for useful knowledge has been disseminated. The ladies have displayed a persevering ardour in their attendance on these means of instruction, so much the more praiseworthy, as it has been uniformly excited by inclination alone. Elementary works have been multiplied; but all this has been done by the exertions of individuals, without any encouragement from the State.

As to public education, it is more easily created than reformed. A good institution would be the best criticism upon the bad. If two or three colleges were founded in London, suited to the wants of the more numerous classes of those who are destined to the pursuits of art, trade, or commerce, in which not Latin or Greek (almost always useless in these avocations) should be taught, but the national language, which has generally been neglected, together with all those branches of knowledge, which if not absolutely necessary, are always useful and agreeable, we should soon see these seminaries draw together a crowd of scholars, and the old colleges would be obliged to correct their system, in order to maintain their ground.

It may be said, that private schools may supply the deficiency; but there is a great difference between public and private establishments. Private education can only succeed by a train of happy events, whilst in public education, a multitude of circumstances are overcome. Besides, domestic education is limited to the rich, whilst public instruction is adapted to the most moderate fortunes. — *Dumont.*

APPENDIX.

(A.) Book I. Ch. viii p. 210.

On Subscriptions to Matters of Opinion.

Of the two English Universities, Oxford is the most ancient and most dignified. Of its numerous statutes which are penned in Latin, as many as fill a moderate duodecimo volume are published, as the title-page declares, for the use of youth: and of these care is taken (for the honour of the government let it be spoken) that those for whose observance they are designed, shall not, without their own default, be ignorant: since, at every man's admission, a copy is put into his hands. All these statutes, as well those that are seen as those that are not seen, every student at his admission is sworn in Latin to observe, "So help me God," says the matriculated person, "touching as I do the most holy Gospel of Christ."*

* "Tu fidem dabis ad observandum *omnia* statuta, privilegia, et consuetudines hujus universitatis *Oxon.* Ita te Deus adjuvet, tactis sacro sanctis Christi evangeliis."—*Parecbolæ sive*

The barbers, cooks, bed-makers, errand-boys, and other unlettered retainers to the university, are sworn in English to the observance of these Latin statutes. The oath thus solemnly taken, there has not, we may be morally certain, for a course of many generations, perhaps from the first era of its institution, been a single person that has ever kept. Now, though customary, it is perhaps not strictly proper, as it tends to confusion and to false estimates, to apply the term *perjury*, without distinction, to the breach of an assertive and to that of a promissive declaration — to the breach of an oath and to that of a vow; and to brand with the same mark of infamy a solemn averment, which at the time of making it was certainly false, — and a single departure from a declared resolution, which at the time of declaring it might possibly have been sincere.* But, if they themselves are to be believed who have made the oath, and who break it, — the university of Oxford, for this century and half has been, and at the time I am writing is, a commonwealth of perjurers. The streets of Oxford, said the first Lord Chatham once, "are paved with disaffection." That weakness is outgrown: but he might have added then (if that had been the statesman's care) and any one may add still, "and with perjury." The face of this, as of other prostitutions, varies with the time: perjurers in their youth, they become suborners of perjury in their old age.

It should seem that there was once a time, when the persons subjected to this yoke, or some one on their behalf, began to murmur: for, to quiet such murmurs, or at any rate to anticipate them, a practitioner, of a faculty now extinct, but then very much in vogue, — a physician of the soul, a *casuist*, was called in. His prescription, at the end of every one of these abridged editions of the statutes — his prescription under the title of *Epinomis seu explanatio juramenti, &c.* stands annexed.† This casuist is kind enough to inform you, that though you have taken an oath indeed, to observe *all* these statutes—and *that* without exception. yet, in ninety-nine instances out of a hundred, it amounts to nothing. What, in those instances, you are bound to do is — not to keep your oath, but to take your choice whether you will do that or suffer — not to do what you are bid; but, if you happen to be found out (for this proviso, I take for granted, is to be supplied) to bear the penalty. For — what now do you think your sovereign seriously wishes you to do, when he forbids you to commit murder? that you should abstain from murder at all events? No surely; but that, if you happen to be found out and convicted, you should sit quiet while the halter is fitted to your neck.

Who is this casuist, who by his superior power washes away the guilt from perjury, and controuls the judgments of the Almighty? Is it the legislator himself? By no means: that indeed might make a difference. The sanction of an oath would then not with certainty be violated; it would only with certainty be profaned. It was a Bishop Saunderson, who, in the bosom of a Protestant church, before he was made a bishop, had set up a kind of confessional box, whither tender consciences repaired from all parts to heal their scruples.

This institution, whether it were the fruit of blindness or of a sinister policy, has answered in an admirable degree, some at least of the purposes for which it was probably designed. It has driven the consciences of the greater part of those by whom the efficient parts of government are one day to be filled, into a net, of which the clergy hold the cords. The fear and shame of every young man of sense, of spirit, and reflection, on whom these oaths are imposed, must at one time or other take the alarm. What! says he to himself, am I a perjurer? If he ask his own judgment, it condemns him. What then shall he do? Perjury, were it only for the shame of it, is no light matter: if his education have been ever so loose, he has frequently heard it condemned; if strict and virtuous, he has never heard it mentioned without abhorrence. But, when he thinks of the guilt of it, hell yawns under his feet. What then shall he do? Whither then shall he betake himself? He flies to his reverend instructors in a state of desperation. "These men are older than myself," says he; "they are more learned, they are therefore wiser: on them rests the charge of my education. My own judgment, indeed, condemns me; but my own judgment is weak and uninformed. Why may not I trust to others? See, their hands are outstretched to comfort me! Where can be the blame in listening to them? in being guided by them? in short, in surrendering my judgment into their hands? Are not they my rulers, my instructors? the very persons whom my parents have appointed to take charge of me, to check my presumption, and to inform my ignorance? What obligation am I under, nay, what liberty have I to oppose my feeble lights to theirs? Do they not stand charged with the direction of my conscience?—charged by whatsoever I ought to hold most sacred? Are they not the ministers of God's word? the depositaries of

Excerpta e Corpore Statutorum, p. 250, Oxon. 1756.

* "Statuimus," say these reverend legislators, "idque sub pœna perjurii," in a multitude of places.

† The title at length is *Epinomis, seu Explanatio Juramenti quod de observandis Statutis Universitatis a singulis præstari solet: quatenus scilicet, seu quousque obligare jurantes censendum est.*

our holy religion? the very persons, to whose guidance I vowed, in the person of my godfathers and godmothers, to submit myself, under the name of my spiritual pastors and masters? And are they not able and willing to direct me? In all matters of conscience, then, let me lay down to myself the following as inviolable rules:—not to be governed by my own reason; not to endeavour at the presumptuous and unattainable merit of consistency; not to consider whether a thing is right or wrong in itself, but what *they* think of it. On all points, then, let me receive my religion at their hands: what to them is sacred, let it to me be sacred; what to them is wickedness, let it to me be wickedness; what to them is truth, let it to me be truth; let me see as they see, believe as they believe, think as they think, feel as they feel, love as they love, fear as they fear, hate as they hate, esteem as they esteem, perform as they perform, subscribe as they subscribe, and swear as they swear. With them is honour, peace, and safety; without them, is ignominy, contention and despair." Such course must every young man, who is brought up under the rod of a technical religion, distinct from morality, and bestrewed with doubts and dangers, take on a thousand occasions, or run mad. To whom else should he resort for counsel?—to whom else should he repair? To the companions of his own age? They will laugh at him, and call him methodist: for many a one who dreads even hobgoblins alone, laughs at them in company. To their friends and relations who are advanced in life, and who live in the world? The answer they get from them, if they are fortunate enough to get a serious one, is—that in all human establishments there are imperfections; but that innovation is dangerous, and reformation can only come from above: that young men are apt to be hurried away by the warmth of their temper, led astray by partial views of things, of which they are unable to see the whole: that these effusions of self-sufficiency are much better repressed than given way to: that what it is not in our power to correct, it were better to submit to without notice: that prudence commands what custom authorizes—to swim quietly with the stream: that to bring matters of religion upon the carpet, is a ready way to excite either aversion or contempt: that humanity forbids the raising of scruples in the breasts of the weak,—good humour, the bringing up of topics that are austere,—good manners, topics that are disgusting: that policy forbids our offending the incurious with the display of our sagacity, the ignorant with the ostentation of our knowledge, the loose with the example of our integrity, and the powerful with the noise of our complaints: that, with regard to the point in question, oaths, like other obligations, are to be held for sacred or insignificant, according to the fashion: that perjury is no disgrace, except when it happens to be punished: and that, as a general rule, it concerns every man to know and to remember, as he tenders his peace of mind and his hopes of fortune, that there are institutions, which though mischievous are not to be abolished, and though indefensible are not to be condemned.

A sort of tacit convention is established: "Give your soul up into my hands—I ensure it from perdition. Surely the terms, on your part, are easy enough: exertion there needs none: all that is demanded of you is—to shut your eyes, ears, lips, and to sit quiet. The topic of religion is surely forbidding enough, as well as a forbidden topic: all that you have to do then, is to think nothing about the matter; look not into, touch not the ark of the Lord, and you are safe."

(B.) Book I. Ch. viii. p. 211.

Mischievousness of Reward latent—Exemplifications.

WHEN a reward is groundless, it may be either simply groundless, or positively mischievous: the act, which it is employed to produce, may be either simply useless, or pernicious.

It would be a nugatory lesson to say, that reward should not be applied to produce any act, of which the tendency is acknowledged to be pernicious; and this whether such act have been aggregated to the number of offences or not. The only cases which it can be of any use, in this point of view, to mention, are those in which the mischievousness of the act, or the tendency of the reward to produce it, is apt to lie concealed.

To begin with the cases which come under the former of these descriptions—those in which the mischievousness of the act is apt to lie concealed. One great class of public services, for which rewards have been or might be offered, are those which consist in the extension of knowledge, or, according to the more common, though obscure and imposing phrase, the discovery and propagation of truth. Now there is one way in which rewards offered for the propagation of truth (that is, of what is looked upon, or professed to be looked upon, as truth) cannot but have a pernicious tendency; and *that* of whatever nature be the proposed truth. A point being proposed, concerning which men in general are thought to be ignorant or divided, if a man sincerely desired that the truth relative to that point should be ascertained, and in consequence of that desire is content to furnish the expense of a reward, the natural course is—to invite men to the inquiry. "How stands the matter? Which of the two contradictory propositions is the true one?" To

a question of some such form as this, he requires an answer. The service, then, to which he annexes his reward, is the giving an answer to a question — such an answer as upon examination shall appear to be a true one, or to come nearest to the truth. The tendency of a reward thus offered, to produce the discovery of the truth, is obvious: the tendency of it will at least be to produce the discovery of what to him, who puts in for the reward, shall appear to be truth. What else should it tend to produce? My aim being to establish what to you shall appear to be the truth, what other means have I of doing this, but by advancing what appears to me to be so? Accordingly, thus to apply the reward, is to promote a sincere and impartial inquiry, and to pursue the best, and indeed the only course that by means of artificial reward can be pursued for promoting real knowledge.

Another course, which has been sometimes taken, is — to assume the truth of the one of two contradictory propositions that may be framed concerning any object of inquiry, — and to make the demonstration of the truth of that proposition the condition of the reward. In this course, the tendency of the reward is pernicious. The habit of veracity is one of the great supports of human society — a virtue which in point of utility ought to be, and in point of fact is, enforced in the highest degree by the moral sanction. To undermine that habit, is to undermine one of the principal supports of human society. The tendency of a reward thus offered *is* to undermine this virtuous habit, and to introduce the opposite vicious one. The tendency of it may be to produce what is called logical truth, or not, as may happen; but it is, at any rate, to produce ethical falsehood: it may tend to promote knowledge or error, as it may happen; but it tends, at any rate, to promote *mendacity*. The proposition either is true or it is false: and, be that as it may, men are either agreed about its being true, or they are not. In as far as they are agreed, the reward is useless; in as far as they are not, it tends to make them act as if they were, and is pernicious.

It may be said — No; all that it tends to do, at least all that it is designed to do, is to call forth such, and such only, whose opinion is really in favour of the proposition, and to put them upon giving their reasons for it: it is not to corrupt their veracity, but to overcome their indolence. But whatever may be the design, the former is in fact its tendency. On the one side, they have reward to urge them; on the other, they have impunity to permit them. For, when a man declares that his opinions on a given subject are so and so, who can say that they are otherwise? — who can say with certainty, what are a man's private opinions? And if the effect be bad, what signifies the intention? Or how, indeed, can the intention be pure, if it be seen that the effect is likely to be a bad one?

Thus would it stand, were it *doubtful* whether there are any persons or no, whose unbiassed opinions are on the opposite side to that on which the demonstration is sought to be procured. But the case always is, that it is *clear* there are such persons; that it is the very persuasion of there being such, that is the cause of offering the reward; and that the more numerous they are, the more likely it is to be offered, and the greater it is likely to be. Such, then, is the danger of promoting mendacity: to avoid which danger, it may be laid down in short terms, as a general rule, that *reward should be given — not for demonstration, but for inquiry.*

More than this, a reward thus applied tends always, in a certain degree, to frustrate its own purpose; and is so far, not only inefficacious, but efficacious on the other side. It does as good as tell mankind, that, in the opinion of him at least by whom the reward is offered, the probability is that men's opinions are most likely to be on the opposite side; and in so far gives them reason to think that the truth is also on that opposite side. "People in general," a man will naturally say to himself, "are not of this way of thinking: if they were, what need of all this pains to make them so?" This, then, affords another reason why reward should be given — not for demonstration, but for inquiry.

Such, accordingly, has been the course pursued in relation to almost every branch of science, or supposed science. The science, or supposed science of divinity, furnishes exceptions, which are perhaps the only ones. What should we say to a man who should seek to promote physical knowledge by such devices? What should we say to a man, who instead of setting men honestly and fairly to inquire *whether*, in regard to living powers, for example, the momentum were in the simple or in the duplicate proportion of the velocity — whether heat were a substance, or only a quality of other substances — whether blunt or pointed conductors of electricity were the safest,—should pay them for endeavouring to prove, *that* in living forces the momentum is in the simple proportion only, that heat is only a quality, and that blunt conductors are the safest?

In divinity, however, examples of this method of applying reward are frequent.

It may be said, that an exception ought to be made from the rule, in the cases wherein, on whichever side the truth may be, the utility is clearly on the side thus favoured. Thus there is use, for instance, in the people's believing in the being and attributes of a God: and *that* even in a political view, since upon that depends all the assistance which the po-

litical can derive from the religious sanction: and that there can be no use in their disbelieving it. That there is use again, in the people's believing in the truth of the Jewish prophecies; since upon that depends one argument in favour of the truth of that history, the truth of which is one main ground of men's expectation of the rewards and punishments belonging to that sanction. This observation certainly deserves great attention. It exhibits a reason which there may be for making an exception to the rule. It does not, however, invalidate the arguments adduced, as above, in favour of it: it does not disprove the probability of the mischiefs on the apprehension of which it is grounded. What it does, is to exhibit a benefit to act in balance against these inconveniences. If, then, the interests of religion be at variance with those of virtue, and it be necessary to endanger the one in order to promote the efficacy of the other, — so then it must be.

It is to be observed, that all the advantage which can accrue to the cause from this manœuvre is composed of the difference between what it may derive from these hireling advocates, and what, were there no such artificial encouragement given, it would derive from volunteers. On this head it may be worth considering, whether the calling forth of the one does not contribute to prevent the enlistment of the other. "What need is there for me, a stranger, to give myself the trouble, when there are so many others whose particular business it is, and who are so well paid for it?" Of this sort is the language which a man will very naturally hold with himself on such occasions.

A strange circumstance it would be indeed, — and one which would afford no very favourable presumption either of the truth or of the utility of the cause which it is meant to favour, — if all the unbiassed suffrages of any considerable majority in number or value of the thinking men should, if left to themselves, be on the opposite side. Great, indeed, must be the penury of unbought advocates, that can make it advantageous, — I do not say merely to the cause of truth, but to any cause, however wide of the truth, — to apply to mercenaries for assistance. Of how little weight the suffrages of the latter are in comparison of those of the former, let any one judge, who has observed the superior eclât with which the work of a layman is received, when it happens to be on the side of orthodoxy.

But however the matter may stand with regard to questions of political importance, in which utility is clearly on one side — whatever reason there be for violating the law of impartiality in this case, it ceases altogether when applied to the merely speculative points which form the matter of those articles of faith, to which on a variety of occasions subscriptions or other testimonies of acceptation are required. These will serve as one set of instances of the other branch of the cases, where the mischievous effects of reward are apt to lie concealed; viz. where, in the case of a line of conduct produced by a reward, apparent or no, the tendency of the reward to produce it is apt not to be apparent at first glance — inasmuch as it may escape observation, that the advantage held forth acts to this purpose in the capacity of a reward.

For an emolument to operate in the capacity of a reward, so as to give birth to action of any kind, it is not necessary that it should be designed so to do. Whenever any such connexion is established between emolument on the one part, and a man's conduct on the other, that by acting in any manner he sees that he acquires an emolument, or chance of emolument, which without acting in such manner he could not have, — the view of such emolument will operate on him in the capacity of a reward. It matters not whether it be the sole act which is to entitle him to the reward, or only one act amongst many. It matters not whether it be the act to which the reward is professedly annexed, or any other act of which no mention is made. It may not be held up to view in that character: it may even be not held up to view at all. In this unconspicuous way an emolument may operate, and in a thousand instances does operate, in the capacity of a reward, on a long and indefinite course of action — in short, on the business of a whole life. Whenever, on the part of the same person, two acts are so connected, that the performance of the one is necessary to his having it in his power to perform the other, a reward annexed to the latter operates eventually as if annexed to the former; and, whether designedly or not, it promotes the production of the one act as much as of the other. In this case, the having performed the prior act is said to be a *qualification* for the being permitted to perform the posterior. The emolument annexed to the act professedly rewarded, is therefore, in this case, as much a reward for assuming the qualification, as a reward for performing the act, for the performance of which a man is required to qualify himself by the performance of the other.

In England (for I will go no farther) the subscribing a declaration of this sort is made a qualification for many of the principal emoluments to which a man can aspire: for every preferment in the church — for the liberty of engaging in the instruction of youth — for admission to the benefits of that mode of education which is looked upon as most liberal and advantageous, and thereby to the enjoyment, or the chance of the enjoyment of any one of that ample stock of emoluments which

have been provided in the view of inducing young persons to put themselves in the way of that favourite mode of education. The articles, or propositions, to which this subscription is required, are termed Articles of Religion By subscribing to these articles, a man declares that he believes the truth of certain facts which they aver. Among these facts there are many, which, whether true or not (a point which is nothing to the present purpose) are plainly, in a political view, of no sort of importance whatsoever. I say of no importance; since they contribute nothing to the furnishing either of any motive to prompt to action, or of any rule or precept to direct it. Be they true, or be they false, — nothing is to be done in consequence — nothing to be abstained from.

The mischievous tendency, which the giving a reward has in this case, is much more palpable than what it has in the other; because the probability of its giving birth to falsehood is the greater.

1. In the case of demonstrative lectures, all that it is absolutely necessary a man should do, is — simply to state the arguments in favour of the proposition in question: he does not necessarily assert his own belief of the truth of it. "Such are the reasons," he may say, "which induce other people, and which, if attended to, may perhaps induce you to believe it: whether they are conclusive or not, it lies upon you to judge: as to myself, whether I myself believe it or no, is another matter. I do not tell you — I am not bound to tell you." In the case of subscription, he directly, plainly, and solemnly says — I believe it.

2. In the next place, the probability of falsehood is much greater in this case than in the other. In the case of demonstrative lectures, men are reasoned with, *lest* otherwise they should not believe: in the case of subscriptions, men are rewarded for subscribing, because it is known many do not believe. Had men never disbelieved or doubted, they never would have been called upon to subscribe: it would have been useless and needless; nor would any one have thought of it.

Those who are inclined to place in the most favourable point of view the political efficacy of subscriptions to such articles, have called them *articles of peace;* as if there were nothing more in saying, I believe this proposition, than in saying, I engage not to say anything that tends to express a disbelief of it.

They would have been much better named, had they been termed *articles of war.*

In regard to speculative opinions, there are but two cases in which men can be said to be at peace: when they think about it, and are of the same opinion; and when they think nothing about the matter: unless we reckon as a third, that of their thinking about it, and differing about it, and not caring about the difference. That the expedient in question has no tendency to promote peace of the first kind, has been already shown: it is equally clear, that it has none to produce peace of either of the two other kinds. The tendency of it is just the contrary. If left to himself, there is not one person in a hundred who would ever trouble himself about the matter. Of this we may be pretty certain. What motive should he have?—what should lead him to it?—what pleasure or what profit is there to be got by it? If left, then, to themselves, the bulk of mankind, — or, to speak more properly, the bulk of those whom it is proposed thus to discipline,—would think nothing about the matter. They would therefore be in a state of the profoundest and most lasting peace. If this should not be granted, at least it will be granted, that it would be possible for them to be so. Subscriptions render it *impossible.* For making peace between men, subscriptions are just the same sort of recipe that it would be for making peace between two mastiffs, to set a bone before them, and then tie them to the same stake.

When both parties are at liberty, both parties are at their ease, and there is peace between them. But when the stronger party says to the weaker, — "Stand forth and lie in the sight of God, or give up the choicest advantages of society, that we may engross them to ourselves," what sort of peace is it that can subsist between them? Just that sort of peace which subsists between the housebreaker and the householder, when the one has bound the other hand and foot, and gagged him. It is not to be denied but that there may be some sort of uneasiness between them in the first-mentioned state of things; to wit, where, neither of them being sacrificed, they are both at liberty, and both of them protected. But what sort of uneasiness is this? Just that sort of uneasiness which may perhaps subsist between two neighbours at the thought that neither of them can break into the other's house. Against this sort of uneasiness, peace, it must be confessed, affords no remedy: but, from the possibility of there subsisting this sort of uneasiness between two neighbours, or two nations, who ever thought of speaking of them as not being at peace?

If this method of insuring peace were good in one case, how should it be otherwise in any other? Religion, or rather the nonsense which has been grafted on it — (for the part that is capable of being made useful is not thus exposed to controversy) — religion, I say, is not the only topic which has given rise to controversy. So long as there is any man whose knowledge falls short of omniscience, and whose faculties are liable to error, men

will have their differences: they will differ about matters of judgment, and about matters of taste—about the sciences, about the arts, about the ordinary occurrences of life; in short, about everything which has a name. It would then be making peace among the lovers of music to make them swear before God, that they think the Italian style, or that they think the French style, of music is the more pleasing; among the lovers of heroic poetry, that they think it best in blank verse, or that they think it best in rhyme; among the lovers of dramatic poetry, that the unities of time and place may be dispensed with, or that they must be observed. It would be making peace between an affectionate pair, to question them about every possible point of domestic management, till some slight diversity were found in their opinions, and then force one of them to swear, before God, that he was convinced his own opinion was the wrong one. It would be making peace —— But surely by this time, the pacific tendency of this policy must be sufficiently understood.

Another mischievous effect of this policy is the tendency it has to vitiate the *understanding*. Over a man's genuine opinion, such forms, it has been shown, can have no influence: either his veracity must give way, or his understanding, or both: he must deceive either himself or others. A deceit of some kind or other he must put on somebody; either on himself or others. There is one thing which a man cannot do; that is, destroy the force of arguments which are actually present to his mind. There is another thing which he is enabled to do in a great measure; that is, keep them from getting there. This, accordingly, is what, if the consciousness of falsehood sit uneasy on him, he will labour to do with all his might. To believe, is not in his power: for, when all the arguments that have ever been urged, or can be devised, in favour of the proposition, are collected and applied to his mind, and make no impression, what help is there? What may perhaps be in his power is, not to disbelieve: and that, if possible, he will do. But thus to shut the right eye, if one may so say, of the understanding, and keep open only the left, is not the work of a minute nor of an hour. He must make many ineffectual attacks, and return as often to the charge: he must wage war against the stubbornness of the understanding—he must bring it under the dominion of the affections—he must debilitate its powers—he must render it incapable of placing, in a clear light, the difference between right and wrong. In a word, he must instil into his mind a settled habit of partiality and bad reasoning—a habit of embracing falsehood with facility, and regarding truth, not with indifference merely, but with suspicion, in the apprehension of being brought by it into trouble.

One might imagine, that it could not have both these bad effects at once; that if it have the one, it cannot have the other: if a man disbelieve, his understanding—if he believe, his morals,—are yet safe. But whoever thinks thus, is led away by words: he does not understand aright the workings of the human mind. He supposes the mind fixed as between two rocks; whereas it is perpetually shaken and tossed about, as by a thousand waves. He supposes a man at all times perfectly conscious of the state of his own mind, and aware of the momenta and directions of the incessantly fluctuating forces that are operating on him. But this is not the case with one man in a million, in any the least degree; nor perhaps with any man in perfection. Thus it is also with hypocrisy and fanaticism: it might naturally be imagined, that the one excludes the other; but repeated experience, and long-continued observation, have at length opened the eyes of most men upon that head: and it seems now to be pretty generally understood, that these two seemingly incompatible bad qualities are found frequently in the same receptacle.

LEADING PRINCIPLES

OF A

CONSTITUTIONAL CODE,

FOR ANY STATE.

BY

JEREMY BENTHAM.

(FIRST PUBLISHED IN THE PAMPHLETEER, NO. 44, 1823.)

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CONSTITUTIONAL CODE, &c. &c.

SECTION I.

ENDS AIMED AT.

1. THIS Constitution has for its general end in view, the greatest happiness of the greatest number;* namely, of the members of this political state: in other words, the promoting or advancement of their interests. By *the universal interest*, understand the aggregate of those same interests. This is the all-comprehensive end, to the accomplishment of which, the several arrangements contained in the ensuing code are all of them directed.

2. Government cannot be exercised without coercion; nor coercion, without producing unhappiness. Of the happiness produced by government, the net amount will be — what remains of the happiness, deduction made of the unhappiness.

3. Of the unhappiness thus produced, is composed, in the account of happiness, the *expense* of government. Of the happiness produced by government, the gross amount being given, the net amount will be inversely as this expense.

4. Of the members of this, as of other states in general, the great majority will naturally, at each given point of time, be composed of the several persons who, having been born in some part or other of the territory belonging to the state, have all along remained inhabitants of it. But, to these, for the purpose of benefit, of burden, or of both, will be to be added sundry other classes of persons, of whom designation is made in an appropriate part of the ensuing code.

5. Immediately specific, and jointly all-comprehensive, ends of this constitution are —subsistence, abundance, security, and equality; each maximized, in so far as is compatible with the maximization of the rest.

6. I. *As to Subsistence.*† This speaks for itself.

7. II. As to *Abundance.* This is an instrument of felicity on two accounts: on its own account, and as an instrument of security for subsistence. In this latter character, its usefulness may be still greater to those who possess it not, than to those who possess it.

8. III. As to *Security.*‡ This is *for* good,

* If the nature of the case admitted the possibility of any such result, the endeavour of this constitution would be — on each occasion, to maximize the felicity of *every one* of the individuals, of whose interests the universal interest is composed; on which supposition, the greatest happiness of *all*, not of the greatest number only, would be the end aimed at.

But such universality is not possible. For neither in the augmentation given to the gross amount of *felicity*, can all the individuals in question ever be included; nor can the *infelicity*, in which the *expense* consists, be so disposed of, as to be borne in equal amount by all: in particular, such part of that same expense, as consists in the suffering produced by *punishment*.

Thus it is, that to provide for the greatest felicity of the greatest number, is the utmost that can be done towards the maximization of universal national felicity, in so far as depends on government.

† By *subsistence* — or say *matter of subsistence* — may be understood everything, the non-possession of which would be productive of positive physical suffering: — that, and nothing more. In so far as distinct from, and not comprehended in, the corresponding branch of security, namely, security for subsistence — subsistence itself must be understood as being, in the field of time, limited to a single instant — any instant taken at pleasure.

Accordingly, of the several elements or dimensions of value, to *extent* alone, as measured by the *number* of the individuals in question, can *maximization*, on this occasion, be applicable.

‡ In the words *good* and *evil*, apt additaments being employed, may be seen two appellatives, which, — opposite as are the sensations and other objects which they are employed to designate, — are, as to no small part of their extent, interconvertible: by ablation of *good*, evil is produced; by ablation of *evil*, good. But, on some occasions, the one is the more convenient appellative; on others, the other; on others again, both. Infinite, and in no small degree perhaps irremoveable, are the ambiguity and obscurity produced at every turn by the imperfections of *language*: language, that almost exclusively applicable, though so deplorably inadequate, instrument of human converse.

Of *security* — considered in so far as it belongs to government to afford it, — the several *subject-matters*, corporeal, incorporeal, or say fictitious, taken together, have been found comprehendible under the five following heads: —

1. *Person*: the security afforded in this case, is security *against* evil, in whatever shape a man's

or *against* evil. Security for good is — either for the matter of subsistence, or for the matter of abundance.

9. Security against evil, is either against evil from calamity,* or against evil from hostility.

10. By *calamity*, understand human suffering, in the case in which, by its magnitude and indeterminateness in respect to extent, it stands distinguished from, and above, the quantity ordinarily produced by one and the same cause.

11. By evil from calamity, understand evil from purely physical agency: by evil from hostility, evil from human agency. But, by purely physical agency, no evil is producible, which may not, from human agency, receive its commencement or its increase.

12. Of calamity, the principal sources are —inundation, conflagration, collapsion, explosion, pestilence, and famine.

13. The evil-doers, against whose hostility, that is to say, against whose evil agency, security is requisite, are either external or internal. By the external, understand those adversaries who are commonly called *enemies*.

14. Internal adversaries, against whose evil agency security is requisite, are the *unofficial* and the *official*.

15. By the *unofficial* adversaries, understand those evil-doers who are ordinarily termed *offenders*, *criminals*, *malefactors*. These are resistible, everywhere resisted, and mostly with success.

16. The *official* are those evil-doers whose means of evil-doing are derived from the share they respectively possess in the aggregate of the powers of government. Among these, those of the highest grade, and in so far as supported by those of the highest, those of every inferior grade, are everywhere irresistible.

17. To provide, in favour of the rest of the community, security against evil in all its shapes, at the hands of the above-mentioned internal, and, so long as they continue in such their situation, irresistible adversaries, — is the appropriate business of the constitutional branch of law, and accordingly of this code.

18. As in difficulty so in importance, this part of the business of law far surpasses every other. Of the danger to which an assemblage of individuals stand exposed, the *magnitude* will be in the joint ratio of the *intensity* of the evil in question on the part of each, the *duration* of it, the *propinquity* of it, the *probability* of it; and, on the part of all, the *extent* of it; the extent, as measured

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person, body and mind included, stands exposed to it.

2. *Property:* under which denomination, the matter of *subsistence* and the matter of *abundance*, as above, are comprehended.

3. *Power:* considered in its two distinguishable branches — the *domestic* and the *political*.

4. *Reputation:* a fictitious entity, the value of which, considered in the character of a subject-matter of possession and security, consists in its being a source of respect, or love, or both: and as being, in either case, an eventual source of *good offices*, or say of *services*, receivable from other persons, by the person by whom it is possessed. Take away all services, eventual as well as actual, you strip it of all intelligible value.

5. *Condition in life:* a factitious and fictitious entity, compounded of *property*, *power*, and *reputation*, in indeterminate and indefinitely diversifiable proportions. In the idea of *power*, that of *right* — meaning legal *right*, as being a particular modification of it — a sort of *eventual power* is included.

Examples of condition in life are: — 1. Those constituted by the several genealogical relations, expressed by the words, *husband*, *wife*, *son*, *daughter*, *father*, *mother*, and so on, throughout the whole genealogical tree; 2. The several distinguishable *occupations*, profit-seeking ones included; and the several *political situations*, corresponding to the several offices, with the powers and functions respectively attached to them.

Taken together, — the injuries, *against* which, security *for* these five several subject-matters is requisite to happiness, constitute the most obvious, and as it were tangible, portion of the matter of the *Penal code:* as does the detailed description of the several *cases*, in which a man has *a right to security* against these several injuries, those to property in particular, that of the *civil code:* right to *security*, that is to say, to the eventual appropriate *services*, of the several classes of public functionaries — that is to say, judges and their subordinates, by the exercise of whose functions it is afforded.

A distinction — which must here be kept in view, or a conception, as afflictive as it would be erroneous, will be entertained, is — *that* between a defalcation made from a subject-matter of security (say, for example, from *property*,) and a defalcation from security itself: in which latter case, in the phrase commonly employed, a *shock* is spoken of as being given to security. Howsoever the subject-matter of security be lessened, security itself will not be lessened, if by means of the defalcation made from the subject-matter, the probability of retaining what remains of it, be not lessened. By any such defalcation made from the subject-matter of security taken in the aggregate, so far is security itself from being necessarily lessened, that without such defalcation it could not have existence. Witness *taxation:* without which, nowhere could the business of government be carried on: nowhere could security against adversaries of any class have place: nowhere could security against calamity in any shape be afforded by government.

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* The giving execution and effect to precautionary arrangements, taken with a view to calamity, belongs to one branch of that part of the business of the executive department, which in the ensuing code is styled the *preventive service:* the giving the like support to such precautionary arrangements as are taken with a view to hostility at the hands of the unofficial and resistible class of adversaries, belongs to the other branch of that same service.

by the *number* of those who stand exposed to it. Measuring it in every one of these *dimensions*, — taking into account every one of these *elements of value* in both cases, — minute will be seen to be the danger to which the other members of the community stand exposed at the hands of those their resistible, in comparison with that to which they stand exposed at the hands of these their irresistible, adversaries. In the first case, it has place on no other than an individual scale; in the other, on a national scale.

19. Inferior even is the danger to which they stand exposed at the hands of foreign and declared enemies, in comparison with that to which they stand exposed at the hands of their everywhere professed protectors. Foreign enemies, in the event of their obtaining the object of their hostility, withdraw most commonly from whatever territory they invade, leaving the inhabitants thenceforward unmolested. At the worst, they keep possession of it: and in that case, from the external and resistible, become the internal and irresistible adversaries, such as those above mentioned.

20. On the texture of the *constitutional* branch of law, will depend that of every other. For on this branch of law depends, in all its branches, the *relative and appropriate aptitude* of those functionaries, on whose will depends, at all times, the texture of every other branch of law. If, in the framing of this branch of law, the greatest happiness of the greatest number is taken for the end in view, and that object pursued with corresponding success, so will it be in the framing of those other branches: if not, not.

21. IV. Lastly, as to *Equality*. In the instances of *subsistence*, *abundance*, and *security*, the title of the object to the appellation of an instrument of felicity, is stamped, as it were, upon the face of it—designated by the very name. Not so in the case of equality.

22. In the idea of *equality*, that of *distribution* is implied. Distribution is either of *benefits* or of *burdens*: under one or other of these names, may every possible subject-matter of the operation be comprised. Benefits are distributed by *collation* made of the instruments of felicity—burdens by the *ablation* of them, or by the *imposition* of positive hardship.

23. I. In proportion as equality is departed from, inequality has place: and in proportion as inequality has place, evil has place. First, as to inequality, — in the case where it is in the *collation* made of those same instruments that it has place. In this case, it is pregnant with two distinguishable evils: the one may be styled the *domestic* or *civil*; the other, the *national* or *constitutional*.

24. The *domestic* evil is that which has place in so far as the subject-matter of the distribution is the matter of wealth — matter of subsistence and abundance. It has place in this way:—The more remote from equality are the shares possessed by the individuals in question, in the mass of the instruments of felicity, — the less is the sum of the felicity produced by the sum of those same shares.

25. The national or constitutional evil is that which has place, in so far as the subject-matter of the distribution is *power*. It has place in this way:—The greater the quantity of power possessed, the greater the facility and the incitement to the abuse of it. In a direct way, this position applies only to *power*. But, between *power* and *wealth* such is the connexion, that each is an instrument for the acquisition of the other: in this way, therefore, the position applies to *wealth* likewise.

26. Of inequality as applied to both subjects, — and of the evil with which, in both the above shapes, it is pregnant, — the case of *monarchy* may serve for exemplification: for exemplification, and thereby for proof.

27. Of the maximum of inequality, every monarchy affords an example. Of the matter of wealth, to the monarch is allotted a mass as great as suffices for the subsistence of from 10,000 to 100,000 of the individuals from whom, amongst others, after being produced by their labour, it is extorted. Yet does it still remain matter of doubt, whether the quantity of felicity thus produced in the breast of that one, be greater than that which has place in the breast of one of those same labourers taken on an average, —has place, or at least would have had, but for the extortion thus committed.

28. What is certain is — that the quantity of felicity habitually experienced by a gloomy, or ill-tempered, or gouty, or otherwise habitually diseased monarch, is not so great as that habitually experienced by an habitually cheerful, and good-tempered, and healthy, labourer.

29. True it is, that if, *per contra*, by a monarch maintained at an expense such as the above, good is, by means of that same expense, produced in greater quantity than by a commonwealth chief whose maintenance will not be a hundredth part of the monarch's; — true it is, that on this supposition, the excess of expense, vast as it is, may be not ill-bestowed. But, by whomsoever the existence of any such excess of good is asserted, upon him does it rest to prove or probabilize it.

30. If, in the case of those whose share in the *instruments* of felicity is *greatest*, the excess of *felicity itself* is, on an average, so small, — and, in some individuals out of the small number belonging to this class, the non-existence of any such excess certain — still

less and less will be the probable amount of the excess of felicity, in the case of those whose share in the instruments of felicity is *less* and *less*. And thus it is, that as, in a pure *monarchy*, the distribution made of the external instruments of felicity is in the highest degree — so, in a pure *aristocracy*, is it in the next highest degree — unfavourable to the maximization of felicity itself.

31. Hence, throughout the whole population of a state, the less the inequality is between individual and individual, in respect of the share possessed by them in the aggregate mass or stock, of the instruments of felicity, — the greater is the aggregate mass of felicity itself: provided always, that by nothing that is done towards the removal of the inequality, any shock be given to security, — security, namely, in respect of the several subjects of possession above mentioned.

More shortly thus: —

32. The less unequal the distribution of the external instruments of felicity is — the greater, so as security be unshaken, will be the sum of felicity itself.

33. On the occasion of the distribution made of a mass of burdens, *delinquency* either is, or is not, in question: is not — as where it is for defraying the expense of government that the burdens are imposed.

34. A burden imposed on the occasion of delinquency, is imposed either for the purpose of its operating in the way of *punishment*, or for the purpose of conferring a correspondent *benefit* on some other person or persons, in *compensation* for damage sustained — sustained, namely, in consequence of the delinquency.

35. Correspondent to the evil produced by inequality in the case of *collation*, is the evil produced by it in the case of *ablation*, — ablation made of a mass of the external instruments of felicity in any shape, and in particular in the shape of *wealth*. Other circumstances the same, — the smaller the mass a man possesses of the instruments of felicity in this shape, the greater is the loss of felicity produced in his instance by the ablation of any given mass of them. By the ablation of fifty pounds, more felicity will be abstracted from the breast of a man who has but one hundred pounds for his whole property, than from the breast of one who has two hundred pounds; much more would it, if, instead of the hundred pounds, he had but that same fifty pounds.

36. II. So much for felicity, considered as the product of government. Now as to infelicity, considered as the *expense* by means of which that same felicity is produced. Maximization was the object in regard to the desired product: *minimization* is the object in regard to the expense. Now as to the *elements* of that same expense.

37. The expense is evil — evil produced either for the exclusion of greater evil, or for the production of more than equivalent good: it may be distinguished into *punishment* and *hardship*.

38. *Punishment* is evil, produced under the notion of its being a direct instrument, or efficient cause, of some good *thereby* desired and intended to be produced.

39. *Hardship* is evil, produced as a collateral result of some operation employed for the exclusion of evil, or for the production of good: a collateral result, not an efficient cause.

40. In respect of its shape, expense employed by government, as above, is either *non-pecuniary* or *pecuniary*.

41. The non-pecuniary expense of government is *hardship at large*: the principal modification of it is that produced by forced *personal service*: and, of forced personal service, that produced by forced *military* service.

42. As to the matter of expense, in no shape can it ever be procurable by government, in anything like sufficient quantity, without hardship, or punishment, or the fear of it, or both.

43. Whatever is done by government is done — partly by means of the matter of *punishment*, or the *fear* of it, partly by means of the matter of *reward*, or the *hope* of it.

44. The matter of reward is a portion of the matter of good, considered as employed in the production of felicity in the breast of some individual, in consideration of some act done or supposed to be done by him, or about to be done by him.

45. The matter of reward is not, in any sufficient quantity, procurable by government without expense — expense, as above, in the shape of hardship and punishment.

46. Accordingly, on no occasion, and for no purpose, is *good* producible by government, but through *evil*, as above.

47. Hence, in so far as may be without detriment to the net amount of good produced, the maximization of national felicity requires that *factitious reward* (reward applied by the hand of government, at the expense of the community) be in every shape *minimized*, as well as the matter of punishment.

SECTION II.

PRINCIPAL MEANS EMPLOYED FOR THE ATTAINMENT OF THE ABOVE ENDS.

1. These means are comprisable, all of them, in one expression: maximization of *appropriate official aptitude* on the part of rulers.

2. Of this aptitude, three branches are distinguishable: 1. Appropriate *moral* aptitude; 2. Appropriate *intellectual* aptitude; 3. Appropriate *active* aptitude.

3. Of appropriate intellectual aptitude there are two distinguishable branches: 1. Appropriate *knowledge*; 2. Appropriate *judgment*.

4. By appropriate moral aptitude, understand — disposition to contribute, on all occasions and in all ways, to the greatest happiness of the greatest number; in other words, to the promoting or advancement of the universal interest.

5. If appropriate *moral* aptitude be to a certain degree deficient, — the consequence is, that by abundance of appropriate aptitude in those other shapes, the aggregate of appropriate aptitude will naturally, instead of being increased, be diminished. If hostile to the interests of the greatest number, — the more able the functionary, the more mischievous.

6. To the different branches of appropriate official aptitude, apply correspondently different means. Expressed in the shortest manner, indication may be given of them by the following rules.

7. I. Means applying to appropriate *moral* aptitude: —

Rule 1. In the hands of those of whose happiness the universal happiness is composed, keep at all times the choice of those agents, by whose operations that happiness is to be promoted.*

8. Rule 2. In the hands of each such agent, minimize the power of doing *evil*.

9. Rule 3. Leave, at the same time, as little diminished as may be, the power of doing good.

10. Rule 4. Minimize the quantity of public money at his disposal.

11. Rule 5. Minimize the time during which it remains at his disposal.

12. Rule 6. Minimize the number of hands through which it passes in its way to the hand by which it is received in payment.

13. Rule 7. Extra-reward give none, without proportionable extra-service — extra-service *proved*, and *that* by evidence not less conclusive than that which is required to be given of *delinquency*, with a view to *punishment*.

14. Rule 8. Maximize each man's *responsibility* with respect to the power and the money with which he is entrusted.

15. Rule 9. Means by which such responsibility is maximized, are — 1. Constant dislocability; 2. Eventual punibility.†

16. Rule 10. By the several means above mentioned, — so order matters, that, in the instance of each such agent, the course prescribed by his particular *interest* shall on each occasion coincide, as completely as may be, with that prescribed by his *duty*: which is as much as to say, with that prescribed by his share in the universal interest.

II. Means applying to appropriate intellectual and active aptitude: —

17. Rule 1. For appropriate intellectual and active aptitude, — establish, throughout the whole field of official duty, appropriate preliminary *tests* and *securities*. For these, see the code itself.

18. Rule 2. Maximize, throughout, the efficiency of these same tests and securities.

19. Rule 3. Minimize, in the instance of each office, the pecuniary inducements for the acceptance of it.

20. Follow the observations on which Rule 3 is grounded.

I. The less the money required by a man for subjecting himself to the *obligations* attached to the office, the stronger the proof afforded by him of his relish for the *occupations*.

21. Still stronger, and in a proportionable degree, will be the proof, — if, instead of receiving, he is content to *give*.

22 Every penny, — added to whatsoever remuneration is, as above, sufficient, — adds strength to predatory appetites, and to the means of gratifying them.

23. A throne, — seat of the most extravagantly fed, — is so, everywhere, of the most invariably insatiable, appetites.

24. As to the means, applying, as above, to appropriate moral aptitude, — there is not one of them, of which an exemplification may not be seen, in the constitution of the Anglo-American United States.

25. Under that constitution, in so far as depends on government, — has uncontrovertibly been, and continues to be, — enjoyed, a greater quantity of happiness, in proportion to population, than in any other political community, in these or any other times.

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* To this arrangement, no objection, wearing the face of a rational one, could ever be made, other than that of *impracticability* — an objection formed by the assertion, that, consistently with internal peace and security, no such arrangement can have place. But, in the case of the Anglo-American United States, the groundlessness of this objection has been completely demonstrated by experience — demonstrated by the very first experiment ever made; while, to the purpose of all such persons as had a new constitution to make, this same arangement, even on the supposition that the experiments made of it had, in a considerable number, all of them failed, might still have remained the only eligible one: for, as will be seen below, the above-mentioned constitution is one, which, bating irresistible force from without, affords a reasonable promise of everlasting endurance; whereas every other form of government contains, in the very essence of it, the seeds of its own dissolution — a dissolution which, sooner or later, cannot but have place.

† Namely, immediately or unimmediately, at the hands of those by whom the responsible agents in question were chosen; as is the case in the Anglo-American United States. Say — dislocability, immediately: punibility, unimmediately; namely, by the hands of other agents.

26. By that one example is excluded, and for ever, all ground for any such apprehension, real or pretended, as that of inaptitude, on the part of the people at large, as to the making choice of their own agents, for conducting the business of government.

27. Nowhere else has such universal satisfaction been manifested: satisfaction with the form of the government—satisfaction with the *mode* in which, satisfaction with the *hands* by which, the business of it has been carried on. No other political community is there, or has there ever been, — in which, by so large a proportion of the population, so large a part has been constantly taken in the conduct and examination of the affairs of government; — no other, in which the part so taken has been so perfectly unproductive of disorder and suffering in every shape.

28. No other constitution is there, or has there been, under which, in anything like so small a degree (slave-purchasing and pertinaciously slave-holding States always excepted,) the interest and happiness of the many have been sacrificed to those of the ruling and influential few; — no other, under which what yet remains of that sinister sacrifice, will, with so little difficulty, and sooner or later with such perfect certainty, be abolished.

29. Thus much as to the *all-comprehensive* end of government, in so far as the government is *good*. As to the several above-mentioned *specific* ends, — the means for compassing them would not here have been in their place. The description of them will be found to be in great measure different, according to the differences between the respective ends: they will form the subject-matter — in the first place, of the constitutional — in the next place, of the penal and non-penal, codes.

LIBERTY OF THE PRESS,

AND

PUBLIC DISCUSSION.

BY

JEREMY BENTHAM.

ADVERTISEMENT.

THE lot of the present Tract has hitherto been rather unfortunate. It was begun, continued, and ended, for the purpose, and under the full assurance of its being translated into Spanish, and published at Madrid: it was sent, in the hope of its reaching that capital time enough to be before the public antecedently to the day on which the proposed law, which was the subject of it, would come under final discussion. The person, by whom it was to have been translated and published, was Mr. Mora, at that time editor of *El Constitucional*, the most popular, the most ably conducted, and the most distinguished of the Madrid daily papers. Had they gone according to the course of the post, the letters in question (four in number) would, even the last of them, have arrived in time. But in the first instance, in a proportion which has never been ascertained, some or all of them miscarried. As the miscarriages became ascertained or suspected, other copies were sent; and, at last, the complete series were received. In the meantime, the law, the prevention of which they had in view, passed. But, though the only individual object which they had in view was thus at an end, and the design of them thus far frustrated, the more extensive object which they had in view — more extensive in place as well as time — was neither at an end, nor in its nature capable of being put to an end. That object was — the rendering it manifest, how indispensable, at all times and everywhere, those two intimately-connected liberties — the liberty of the press, and the liberty of public discussion by word of mouth — are to everything that can with any propriety be termed good government. Thus it is, that in respect of this its major object, the work, small as it is, belongs not with less propriety to the country in the language of which it was written, than to that for the language of which it was designed — to the present month of July 1821, in which it is now published, than to the months of September and October 1820, in which it was written: to these countries, not to speak of other countries — to the present month and year, not to speak of future ones.

The law against which these Letters were directed, was passed: but the effects, at the production of which it aimed, have not been produced. The Spanish press has not been enslaved: Spaniards have not, like Englishmen, submitted to be gagged: Spanish, instead of being like English and French ministers, absolute, have been expelled. As to massacres, the authors of that of Cadiz, though they enjoy not the same triumph, nor have obtained the same rewards, have as yet, it is believed, enjoyed nearly the same impunity with those of the Manchester massacre. But the punishment of those who showed what legitimacy and social order is at Cadiz, is yet to come, and may even yet not improbably come: in that country punishment may yet be for the authors of misrule and massacre; while, in this country, it is reserved for the victims of misrule — for those who have escaped from massacre.

Of the reception experienced at Madrid by subsequent addresses of the same author to the same people, something may come to be said, in another publication which is in readiness to pass through these same hands.* As to the present Tract, its lot at Madrid remains still in abeyance. It had been about half translated, when, by an act of the sort here protested against, the translator was thrown into a prison. The illegality of that act has since been recognized, and his enlargement has been the consequence. But, under the extraordinary weight of the business which presses upon him in these eventful times, whether the translation has as yet been published, or so much as completed, is not at present known: if not by his, it will, however, ere long, be laid before the Spanish public by some other hand.

The situation of that distinguished publicist is, at this moment, an altogether curious one. A ministry has lately been expelled; and in this expulsion he has borne a leading, not to say the principal, part. To have been, and to continue to be, in a pre-eminent, not to say a peculiar degree, the object of the monarch's confidence, has been, at the same time, matter of public and vehement accusation against him. Far from denying the fact, he openly avows it. "You know," says he, "what my opinions, what my affections are; you know that they are all liberal ones: your wish is, that the opinions — that the affections — communicated to your monarch, should be liberal ones; by whom can they be communicated, but by those by whom they are entertained? What would you be gainers, if your monarch communicated with none that were not your enemies?"

* See "*Three Tracts relative to Spanish and Portuguese affairs*" in this Collection.

JEREMY BENTHAM

TO

THE SPANISH PEOPLE.

LETTER I.

On the Liberty of the Press—the approaching Eight Months' sleep of the Cortes — and the Exclusion of Experience from the succeeding Cortes.

London, 7th October 1820.

SPANIARDS!—The Madrid intelligence of the prosecution of a newspaper editor, for comments on the Madrid system of police, and of the introduction of the proposed law against political meetings, has just reached me. I am astounded!—What? is it come to this?—so soon come to this? The men being men, of their disposition to do this, and more, there could not be any room for doubt. But that this disposition should so soon ripen into act, this (I must confess) is more than I anticipated. Neither of the issue of the prosecution, nor of the fate of the proposed law, has the intelligence yet reached me. But that any such prosecution should have been instituted — any such proposed law introduced — that the impatience of contradiction, not to say the thirst for arbitrary power, should so soon have ventured thus far, — these, in my view, are of themselves highly alarming symptoms.

By the prosecution, if successful, unless the alleged offence have features in it such as I do not expect to find in it, I see the liberty of the press destroyed: by the proposed law, if established, I see the almost only remaining check to arbitrary power destroyed.

Taken together, they form a connected system — these two measures. By the authors of this system, you have of course been told, that it is indispensably necessary — necessary to *order*, to GOOD *order*, to *tranquillity*—and, perhaps, honourable gentlemen may have ventured so far into the region of *particulars* and *intelligibles*, as to say — to *good government*, and some other good things. — Spaniards! it is neither necessary, nor conducive to, nor other than exclusive of, any of those good things. What says experience? In the Anglo-American United States, of the two parts of this system, neither the one nor the other will you see. No prosecution can there have place, for anything written against the government, or any of its functionaries as such. No restriction whatever is there on public meetings—on public meetings held for any such purpose as that of sitting in judgment on the constitution — on any measures of the government — or on any part of the conduct of any of its functionaries. Yet, if there were a country in which these restraints, or either of them, would be necessary or conducive to good government, it would be *that*; for, in that country the people are all armed: armed, at *all times*, in much *greater* proportion than in any other country — armed, at *any time* they please, *every one* of them.

No: in that only seat of real and established good government (for yours, alas! is not yet established) — in that country, in which, ever since *that* good government was established—in which, for the forty years that it has been in existence, public tranquillity has not known what disturbance is, — there is no more restriction upon men's speaking together in public, than upon their eating together in private. People of Spain! do you know this? You scarcely do. But is it not high time you should?*

* *May* 31, 1821.—People of England! is it not high time that you too should know it? Well, then, so you shall, in so far as it is in my power to make you know it.

Here follows an extract from a pamphlet, printed, and, within a narrow sphere, for a particular purpose, some little time ago circulated, but not yet published: in a short time it is intended to follow the present one.

"Oh, but what is this you would have us do? Would you have us destroy the government? — would you leave the government of the country without protection? Its reputation, upon which its power is so perfectly dependent,—would you leave that most valuable of its treasures without protection?—would you leave it in the power of every miscreant to destroy it? In such a state of helplessness, is it in the nature of things that government should subsist anywhere?"

Subsist? Oh yes, everywhere; and be all the better for it. Look to the *United States*. There you see government, do you not? Well: there you see government, and no *libel law* is there:

Both these lessons of experience you shall see more particularly in time and place: you will on that occasion see, in the same manner, a passage in history, an allusion to which is

the existence of the supposed deficiency you shall see; and where libel law is the article, you will see how much better *deficiency* is than *supply*.

In answer to a letter of inquiry written by me not long since — the exact time is not material, here follows all that relates to this subject, of a letter written by a person, whose competence to give the most authentic, and in every respect trust-worthy information on this subject, is not to be exceeded.

"Prior to what was commonly called the *sedition act*, there never was any such thing known under the federal government of the United States (in some of the individual States they have sometimes, I believe, taken place.) as a criminal prosecution for a political libel. The *sedition act* was passed by Congress in July 1798. It expired by its own limitation in March 1801. There were a *few* prosecutions under it, whilst it was in force. It was, as you have intimated, an unpopular law. The party that passed it went out of power by a vote of the nation in March 1801. There has been no prosecution for a political libel, under the authority of the government of the United States, since that period. No law known to the United States would authorize such a prosecution. During the last war, the measures of the government were assailed, by the party in opposition, with the most unbounded and furious licence. No prosecution for libel ever followed. The government trusted to public opinion, and to the spontaneous, counteracting publications, from among the people themselves, for the refutation of libels. The general opinion was, that the public arm grew stronger, in the end, by this course.

"I send you a volume of the laws of the United States containing the sedition act in question. It will be found at p. 97, ch. 91. You will observe a departure from the common law, in that *it allowed a defendant to avail himself of the truth of the charges contained in the publication.*"

Thus much for my authority: whose name I cannot at this instant take upon me to make public.

Chap. 91. [XCI.] An Act in addition to the act entitled, "An Act for the punishment of certain crimes against the United States."[a]

Fine and imprisonment for unlawful combinations to oppose the measures of Government; or counselling, advising, &c. riot, insurrection, &c.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any persons shall unlawfully combine or conspire together with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing, or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise, or attempt to procure, any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt, shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanour, and on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment, during a term not less than six months, nor exceeding five years; and further, at the discretion of the court, may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

Offenders may be holden to find sureties, &c.

§ 2. And be it further enacted, That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act; or to aid, encourage, or abet, any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[b]

Fine and imprisonment for printing, &c. false, scandalous, and malicious writings, &c. against the Government, Congress, &c.

§ 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence, in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

The defendant may give the truth in evidence, &c.

The jury to determine the law and the fact, &c.

§ 4. And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: provided that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force. [Approved, July 14, 1798.] In

Limitation of this act to the 3d March 1801: provided, &c.

[a] Expired. See Orig. Act of 30th April 1790, chap. 36, page 92, vol. ii.

[b] See the Constitution, Amendments, art. 1. page 72, vol. i.

all that room can be found for here. A law had been passed, authorizing prosecution for the sort of offence, prosecuted for, as above, among you. Under it, one single prosecution took place — it failed: the law was repealed — the authors of it lost the public confidence, and with it their political influence.

I. As to the restraints on constitutional liberty, that my conception of the matter may at once be seen in its utmost extent, I shall, in the present letter, state at once the measures which I would venture to recommend for examination. But, in the meantime, it may be some satisfaction to you, to see before you an outline of the considerations by which the wish to see some such measures carried into effect has been produced.

First, as to the liberty of the press.

Every expression betokening disapprobation of the texture of the government, or of the conduct of any person bearing a part in the exercise of the powers of government, conveys an imputation on *reputation*—on the reputation of the persons at the head of the government. This cannot be denied: for as at all times the texture depends upon the person so situated, in proportion as the texture is ill adapted to the only proper end of government, so are *they* to their situations: and between one degree of disapprobation and another, it is not possible to draw a line. Accordingly, any such expression is, at pleasure, commonly considered by them in this light, and punished. If the imputation is to a certain degree, particular, — imputing an individual act legally punishable, or at least disreputable, — it constitutes the sort of act expressible by the term *defamation:* if to a certain degree vague and general, *vituperation.* But these sorts of acts are, both of them, commonly treated on the footing of offences: and this, too, even where the person who is the subject of the imputation is a private individual, not bearing a part in the exercise of any of those powers.

On this subject, the following are the assumptions that, in governments in general, seem commonly to have been made:—

Whatsoever be the treatment of an offender, in the case where the party offended is but a private individual, in the case where he is a public functionary — especially if spoken of as such, much more if the whole body of the rulers, or those at the head of it, are the parties offended, — the offence is more mischievous, or, on some other account, creative of a demand for a stronger repressive force, in the shape of punishment, as well as in all other shapes; and this force ought to rise in magnitude as the rank of the person offended rises; and the judicatory, by which cognizance is taken of the offence, should in this case be different; as also the forms of procedure different.

My notion, as confirmed by the practice of the Anglo-American United States, is, in all those particulars, the reverse. In the case of the public functionary, for *vituperation*, how gross soever, there should be no punishment at all: for defamation, no punishment unless the imputation be false and groundless; nor even then, unless the false assertion, or insinuation, be the result of wilful mendacity, accompanied with the consciousness of its falsity, or else with culpable rashness — namely, with that which is exemplified by the giving credence and currency to an injurious notion, adopted without any, or on palpably insufficient grounds: no separate judicatory: no separate form of procedure, styled *penal* or *criminal*, while, in the other case, it is styled *civil;* and, in the case of *defamation*, in disproof of rashness of assertion, as well as of wilful falsehood, the defendant should be at liberty to make proof of the truth of the imputation; and, for that purpose, to extract evidence from the person who is the subject of it, as he might from any other person at large.

For these notions, speaking in general terms, my reason is — that to place on any more advantageous footing the official reputation of a public functionary, is to destroy, or proportionably to weaken, that liberty, which, under the name of *the liberty of the press*, operates as a check upon the conduct of the ruling few; and in that character constitutes a controuling power, indispensably necessary to the maintenance of good government.

Speaking more particularly, whatsoever evil can ever result from this liberty, is everywhere, and at all times, greatly outweighed by the good.

1. The good, consisting, as it does, in the security thus afforded for good government; and covering, as it does, the whole field of government, is plainly infinite.

2. In comparison with this good, the utmost evil that from this cause can result to any person, or to any number of persons, however situated, would, even if altogether unaccom-

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In the above letter, in speaking of the execution given to the liberticide law that has just been seen, the word *prosecutions* (it may have been observed) stands in the plural number. On the other hand, while writing this letter of mine to the people of Spain, my supposition was — that there had not been any more than one. The conception had been derived from a conversation with another United States' functionary of the highest distinction; on the occasion of which conversation, *one* prosecution had — possibly in his eyes, certainly in mine — eclipsed the other, or the few others. The case was that of a prosecution instituted by the Marquess of Casa Yrujo, in his quality of Minister from the court of Madrid to the republic of the United States, against some individual (name not recollected) for a libel on the Spanish government. The defendant was acquitted.

panied with compensation, be comparatively minute.

3. In the elevated situation in question, whether the imputation be unmerited or merited, the nature of his situation furnishes a man with means of support and defence, — and in so far as the imputation is false, means of disproof and refutation, — increasing with the height of his situation; and, at any rate, much beyond any which can be within the reach of an individual not so situated.

4. In every such situation, immediately upon his advancement into it, and therefore antecedently to his becoming the object of any such imputation, a man finds, in the advantages attached to such his situation, a compensation for all the evil to which, in this, and all other shapes taken together, he stands exposed by it.

5. The higher the situation, the more abundant the antecedent compensation it thus puts him in possession of.

Against the allowance of this liberty, considered with a view to its effect on the goodness of the government, no arguments that have been or may be adduced, will bear the test of examination.

I. First comes *dangerousness*. Dangerous, it always and everywhere is: for it may lead to insurrection, and thus to civil war; and such is its continual tendency.

Answer: In all liberty there is more or less of danger: and so there is in all power. The question is — in which there is most danger — in power limited by this check, or in power without this check to limit it. In those political communities in which this check is in its greatest vigour, the condition of the members, in all ranks and classes taken together, is, by universal acknowledgment, the happiest. These are the Anglo-American United States, and the kingdom of Great Britain and Ireland. In the republic, this liberty is allowed by law, and exists in perfection: in the kingdom it is proscribed by law, but continues to have place, in considerable degree, in spite of law.

Take away this check, there remains no other but the exercise of this same liberty by speeches in public meetings: and in that shape, besides that it is not applicable with nearly equal advantage, it is much more dangerous.

II. Next comes *needlessness*. To the prevention of misgovernment, the other remedies that government itself affords, are adequate.

The rulers in chief, whoever they are, have nothing so much at heart as the happiness of all over whom they rule: and that wisdom by which they are informed of the means most conducive to that end, is in them perfect; or, if not absolutely free from all imperfection, that endowment is in their situation much more so, than in that of the subject-many.

This being assumed, — in this union of all the elements of official aptitude — (appropriate probity, appropriate intellectual aptitude, and appropriate active talent) — with uncontrouled power in the persons of the *rulers in chief*, the subject-many possess an adequate security against any want of correspondent aptitude in the persons of their several *subordinates*. In case of simple inaptitude, removal will follow: in the case of inaptitude, coupled with delinquency, prosecution, and thence punishment, will follow.

Answer: The rulers in chief, whoever they are, if they are men, have their own happiness more at heart than that of all over whom they rule put together: the very existence of man will in every situation be found to depend upon this general and habitual self-preference.

As to *wisdom*, it can never be so near to perfection without, as with these all-comprehensive means of information, which nothing but the liberty here in question can give.

Upon exertion depends the possession of all the several elements of official aptitude above mentioned, and in particular the acquirement of the appropriate information, as above. But the higher the situation, the less is the exertion which he who is in it is disposed to apply to the functions of it. For the higher the situation, the less he has to apprehend for himself in case of demonstrated inaptitude in any shape.

Without this liberty, the rulers in chief will not be sufficiently either disposed, or enabled to apply, so much as simple removal, much less punishment, for remedy against inaptitude on the part of their subordinates. Beholding in those subordinates, so many ever-obsequious instruments in their hands — instruments continually applicable to their own personal purposes — the rulers will naturally and generally feel more sympathy for them than for the people at large: they will not be disposed to remove or punish them, merely for acting against the people's interest; much less for acting in favour of the separate and sinister interest of these same rulers: as where the rulers themselves engross or share the profit of the offence.

To the formal prosecution at the suit of rulers, — and, where allowed, at the suit of subjects, — the informal informations, which it is the property of this liberty to supply, constitute, in one case, an assisting support — on the other, a succedaneum and substitute. Destitute of this assistance and this substitute, prosecution, even when not refused, is at once insufficient and over expensive. So small as is the number of prosecutions, compared with that of delinquencies, the delay, vexation, and expense attendant on them, compose no inconsiderable evil. What, if such prosecutions were as numerous in proportion

to delinquencies, as under the liberty in question these *informations* are, that are given by the exercise of it? Under the least bad systems of judicial procedure extant, the prosecutions teem with factitious delay, vexation, and expense, over and above what is natural and necessary. Attendant on informations, there is neither factitious expense, nor factitious delay: vexation, there is comparatively little — none but what is proportioned to delinquency, and stands in lieu of punishment.

For the establishment of the truth or falsity of the imputation — for the establishment of the guilt or innocence of the party suspected of delinquency — the utmost stock of relevant and applicable facts and arguments that can be secured by prosecution, is very imperfect without the addition of those which this liberty and nothing else is capable of supplying.

II. So much as to the liberty of the press. Now as to the liberty of public meetings.

Without much variation, the arguments that apply to the former of these two branches of personal liberty and constitutional security, apply to this. But of this branch the extinction is already known to have been taken for the object, as well as subject, of an already *proposed* law: and, ere this, the object may have been effected by an *established* law.

In support of this extinction, the English newspapers have brought to my view a system of argument, stated as having been employed by various public functionaries. To these, after holding up to view the proposed law in what seems to me its proper colours, I propose to give a distinct consideration in another letter.

From one who, in regard to the individual facts of the case, has no other information than what is above alluded to, any observations made in such circumstances are not altogether out of all danger of being regarded as ungrounded; and to such a degree, as to be destitute of all claim to notice. But — such is the nature of man when clothed with power — in that part of the field of government which is here in question, whatever mischief has not yet been actually done by him to-day, he is sure to be meditating to-day, and unless restrained by the fear of what the public may think and do, it may actually be done by him to-morrow. Of the documents which form the subject of the ensuing remarks, it is impossible for me to say to what extent the accounts that have reached me may not be incorrect. So far as regards individuals, these remarks must therefore from first to last be considered as no other than *hypothetical*, depending for their appositeness upon the correctness of the reports respectively given of these arguments. But if, considered as applied to the arguments themselves, the remarks should be found justly applicable, the fact, that on the particular occasion in question, the arguments were not actually employed by the persons to whom they stand ascribed, will not detract much from the value of any information which the remarks may be thought to afford. Ungrounded in the character of a *censure*, in that of a *warning*, the remark may not the less have issue.

MEASURES PROPOSED.

1. In regard to liberty of writing and speech on political subjects, repealing what requires to be repealed, place matters exactly on the same footing as that in which they are in the Anglo-American United States. And, to narrow the inquiry, let the footing be that on which they are in the territory immediately under the government of Congress, and where the subject of discussion is the conduct of the members of the ruling body, so denominated, or any of the official persons subject to their controul.

2. In regard to assemblies in particular, insert a declaration, giving the people the assurance that, forasmuch as there exists not any law to the contrary, they remain at liberty, at all times, and in all places from which they are not excluded by special ownership, to meet, for the purpose of delivering their opinions, in the freest manner, on the conduct and character of their rulers; — at any rate, of all such of their rulers as are, or may be, the objects of their choice, in the character of representatives, as also of all such other persons as are subject to the controul of such their representatives. And let it not be forgotten, that all persons thus chosen are thereby not their masters but their servants. In regard to secresy, insert, moreover, a declaration that, for keeping their proceedings as secret as they please, they may take what precautions they please, so that no engagement, wearing the form of a religious oath, be employed: nor any scheme entered into, for the performance of any act importing bodily or other injury to any individual, or on any other account forbidden or made punishable by law, be in the number of their objects. And note that, in regard to secresy, on this footing stands, in England, the unreproached, and irreproachable society of Free Masons.

In the United states, whoever thought, either of instituting secret societies, or of being jealous of them if instituted? Of secresy under such a government, what could be the object? Secresy in subjects, supposes tyranny in rulers.

Under these circumstances, what fills me with apprehension is — the approaching nonentity of the Cortes. The only bridle to ministerial despotism taken out of its mouth,

without a possibility of being replaced for eight months to come! Now, if they had but the possibility of existence, now then would be the time for meetings of the people for petitioning the Cortes not to desert its post.* Now would be the time for saying to them, "Do not, in deference to the rash and ill-judged—the suicide letter of the constitution, risk the destruction of the constitution itself, or at least of the most essential portion of what is good in it!" True it is, that in the Cortes I see an authority, under the eye of which the liberty of the press has, I much fear to find, been sadly weakened, and perhaps destroyed. True it is, that in the Cortes I see, at any rate, an authority by which the liberty of public discussion has without reserve been taken away. True. But in the Cortes I see an assembly in which, so long as it is sitting, it is at all times in the power of any one member to use his endeavours for the restoration of the banished liberties, and to spread over the whole kingdom the arguments on which these endeavours are grounded.

By this strange article of the constitutional code, the Cortes, the only assembly in which, should misrule reasume its recent enormity, the voice of complaint can be heard, is laid asleep, is reduced to a state of nonentity for eight months.

And, during these eight months, what are the hands in which all the powers of government are lodged? The self-same hands in which till t'other day they were employed—it is needless to say how. By article 171 (power the 5th,) to the king it belongs "to fill up all civil and military employments:" amongst others, therefore, the employments of the seven "Ministers of State and of Public Affairs;" those seven ministers, by whom taken collectively, during this long sleep, as well as after the death of the Cortes, the whole mass of the powers of government is exercised. These powers the king may at all times collectively and individually take, and at each moment lodge in any hands he pleases. To this choice I am unable to find any the smallest check.

I see, indeed, a council of state, which in art. 237, by a provision not very consistent in its terms with the terms of that same 171st article, shares with the king the power of conferring ecclesiastical benefices and offices of judicature: as if offices of judicature were not civil employments—as if this were not enough, supposing the unofficial advisers of the crown to be again what they were so lately, and suppose at the same time, that in the whole court and country, persons in so large a number as seven are not to be found suitable to the purpose of giving to the whole power of government an exercise similar to that which was so lately given to it—one single minister, unless prevented by some regulation, no tidings of which have reached me, may, under this same constitution, be made sufficient. For, by art. 224, "By a particular regulation approved by the Cortes *will* be pointed out," it is said, "the business peculiarly appertaining to each minister." But till such demarcation has been made by the Cortes, everything is left at large, and to any one or more of the seven, as much of the power of all seven may be given as those same irresponsible advisers shall advise: and amongst the rest, the filling up, and for aught appears, after having emptied them for the purpose, "*all civil and military employments:*" under *civil*, *ecclesiastical*, and *judicial*, being respectively included, or not included: let those who are sure, say which.

"What?"—says some one—"have you then really any such fear, as that of this eight months' sleep of the Cortes, the restoration of the recent habits of government will be the consequence?" No; I have not: for, how small soever may be the regard of the men in question for the security of the *subject-many*, their regard for their own security will be not the less; and I see not by what means any tolerably effective provision can be made for it, unless it be such by which, along with the ruling few, the subject-many will be secured, at least against any condition equally disastrous with that from which they have so lately emerged.

But, knowing little more of them than that they are men, what I am afraid of is this—namely, that in the situations in question, men will do what all men would be disposed to do in their places:—that they will embrace every opportunity for sacrificing the interest of the whole community to their own particular interests: that in particular, they will give the utmost magnitude possible to the mass of useless and needless offices, and to the emolument of those same offices, as well as to that of useful and needful ones: that they will dispose of offices for their own profit, either in a direct way by selling them, or,—in a way not less effectual by being indirect,—by giving them to persons in dependencies, or otherwise in private connexion with them, be the persons ever so apt or ever so inapt, for the functions

* In fact, the Cortes did not desert its post. In deference to the constitutional code, the members forbore to promulgate acts in their corporate character, but, consenting to the return of the smaller part of their number to their constituents, a considerable majority remained in the capital, continuing their consultations: and it was by their interposition that it was preserved from the hands of a governor, nominated—not less pointedly against the letter than against the spirit of that code, by the monarch alone, without the concurrence of any other constituted authority in that behalf appointed.

of those same offices: and that, to the same end, they will give and secure to every other branch of expenditure every practicable increase, and to retrenchment every practicable diminution: that, with or without just cause, should there be any persons to whom it has happened to incur their displeasure, they will let slip no opportunities of allaying it by vengeance: and that, in a word, they will do as those do and have been used to do, under whom it has hitherto been my good hap to live unhanged, unsabred, unimprisoned, unbanished, and unruined.

This is not all. For giving permanency to a system of this sort, these instruments of monarchy would scarcely feel sufficient confidence in their own force: they would look out for coadjutors in the aristocracy; and thus, in the union of the monarchical with the aristocratical interest, you would see and feel, as here, an alliance defensive and offensive against the interest of the people—of the ruling one and the sub-ruling few, against the subject-many. They would call to their aid the landed proprietors of the country as such, and in particular the proprietors of the vast overgrown properties. In these they will find not only natural allies, but sure, and perpetual, and steady, and in every respect matchless ones. The possessor of an office, howsoever abundant in power, may be removed out of it at any time, and without so much as the imputation of injustice. Not so the great landholder — the proprietor of a tenth part, an eighth part, or a fourth part of the land of a whole province; and with it of a proportionable mass of political influence. But neither time nor space will here permit me to enter into any detail of the mischiefs with which such a confederacy is pregnant: except to conclude with saying — that the last, though not the least of my fears is — that, to give completeness to the system, the measures which, at the instance as it seems of these same ministers, have, I fear, already been taken by the majority of the Cortes for the extinction of all power of controul in the hands of the people, may, by means of such an alliance, be carried into full execution, and perfected and perpetuated.

Another set of fears, though not quite so intense as the foregoing, remains still behind — that they will give to those natural enemies of the people the fullest security that can be given to them against any idea so intolerable, as that their as yet unborn descendants will find themselves unloaded with wealth, no prospect of which can ever have entered into their minds: that they will secure them against so cruel an apprehension as that all their children but one should not always be impoverished for the benefit of that one; and against the still more intolerable apprehension, lest their creditors should receive any part of the amount of their just debts: that, in atonement for the injury thus done to their thus impoverished children, they will secure to them, at the expense of the still more impoverished lower orders, a stock of sinecures of all classes. matter of emolument granted at the expense of the State, on pretence of rendering to man some service never rendered, or on pretence of rendering some pretended service to that Being to whom all service is unprofitable: and, to crown all, that having with such efficient anxiety provided for keeping them stocked as richly as may be with the benefits of political society, they will join in securing to them an exemption as extensive as may be from its burthens.*

No: nothing can be more inconceivable to me than the grounds, if they were good and avowable ones, on which, for two-thirds of every year, the power in which you, the people, see your only hope, should be reduced to perfect nullity;† and of all times, this too at the very commencement of the system on which all hope of salvation rested: as if, for eight months in the year, all sheep dogs were to be kept locked up, and the sheep committed during that time to the guardianship of the wolves. At no time, surely, nor in any nation, can there have been, or can there be, so much work to be done: and at this time it is, that, of the quantity that might have been employed in work, two-thirds are taken off; and taken off with every mark of anxiety, — consecrated to idleness.

With us in England, where everything, how ill soever, is so fully and permanently,

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* Before this letter was sent off, grounds were received for the hope, since confirmed, that this set of fears might, for the present at least, escape being realized. In the copy that went to Madrid, this paragraph was accordingly omitted. But under the Matchless Constitution, the envy and admiration of the world, let English readers, especially those by whom the endeavours of Romilly were followed by sympathizing eyes, say whether there are any of these fears on which the imputation of being imaginary can be fastened.

In the Anglo-American United States, an effectual door has been for ever shut against all such fears.

To come back to the main point, and conclude. The last, though not the least, of all their fears is — lest un-measures, which, at the instance, as it should seem, of these same ministers, have already been taken by the majority of the Cortes, for the extinction of all power of controul, have, by means of this too natural alliance, been carried into full execution, and perfected and perpetuated.

† In its corporate capacity, accordingly, so it was: in consequence, the constitution would have been destroyed, had not the members of the Cortes, in their individual capacity, continued at their post, and saved it and themselves in the manner mentioned in a former note.

and for so vast a length of time has been, established, the whole year may, if so the king pleases, be employed in doing (with the exception of giving him a new wife) whatever else he pleases.

Strange as it is, the article by which, at the time when the demand for experience, and for the talents formed by it, stands at its highest pitch, the next succeeding Cortes is so anxiously deprived of all the experience and talent acquired in the present, is not quite so strange. In a jealousy entertained of the probity of these first objects of the people's choice, I can conceive a possible, howsoever indefensible cause of it. But while the jealousy, of which the persons chosen by the people are the objects, is so broad awake,—that all jealousy of those against whose power these same objects of the people's choice are to afford the sole security, should be so perfectly asleep,—this is the thing that astonishes me: that such jealousy and such confidence should at the same time have found place in the same bosoms.

No: it is not so much of a monarch that I am afraid, for he is mutable: it is of the aristocracy that I am so much afraid; for *that* is immutable. It is itself immutable: and no less immutably adverse is its interest to the interest of the people.

Postscript. This moment, comes information of the decision of the Cortes, in relation to the Persas; and, of the whole number of 69, not more than one is to be so much as prosecuted. At their own homes they are to continue; and there, should his Majesty have any fresh occasion for their services, there he knows where he may be sure to find them. Nothing can be more merciful—nothing more convenient. Now, if from this mercy no mischief to the people shall ensue, whosoever else may be dissatisfied with it, I shall not be so. It is not for any pleasure I can take in the contemplation of what he suffers, that I would punish the most mischievous of criminals. But a question I cannot help putting to myself is,—If, under the Constitution, those who seek the forcible destruction of it have nothing to fear, while he who seeks the preservation of it by means not acceptable to those by whom this impunity has been granted has much to fear, what chance has it for continuance?

Any leading member, in gratitude for all this mercy,—has it happened to him to have received, or to be about to receive, a requital in any shape from any of those who have been preserved by it? If any such gratitude has been manifested, so much the better, and it cannot be too extensively known; for, the more expensive the gratitude, and the more extensive the knowledge of it, the more extensive will be the assurance, that should any such attempt to destroy the constitution be repeated, and success fail of crowning the attempt, the impunity will not be entire.

LETTER II.

On the Liberty of Public Discussion in Free Meetings.

18th Oct. 1820.

SPANIARDS! I continue.—My former letter was principally allotted to the liberty of the press. Intimation was there given, that the arguments pleading in favour of that branch of personal liberty and constitutional security apply with little variation to that which forms exclusively the subject of the present letter. The proposed law, as it stood in four articles, together with the speeches by which I found it supported, will constitute the text of this discourse.

I commence with the proposed law itself: the text of it, in the state in which, on the 21st of September 1820, according to the English translation, it came out of the hands of Mr. Goreli—(Traveller, Oct. 6, 1820.) "The law regarding public societies," I see it termed. The law for the *prevention* of popular assemblies, it might have been termed; for, of this law, what is the object? what the declaredly intended effect? In respect of this security against misrule, to place the people of Spain exactly upon the same footing as the people of Morocco. Yes; exactly upon the same footing as the people of Morocco: this you will see. Four, and no more, is the number of its articles: these are quite sufficient. Give but to language the extent it is susceptible of, the fewer the words, the greater the effect. Think of this, ye who, to make display of your humanity, complain of the multitude, nothing but the multitude, of penal laws. Draco made but one: Death is for him who breaks any one of my laws.

"Art. 1. All Spaniards will have the right of speaking on political affairs by conforming to the disposition of the law." Good: and so have all the Moroccans. What is it, this same disposition of the law? Wait to the next article but one, and you will see it.

"Art. 2. Every assembly not authorized by law will immediately cease." If so, and without revival, then will, ere long, the constitution itself cease, or at least everything that is good in it.

"Art. 3. Meetings shall not take place but in virtue of the *permission* of the local authority, who will take the necessary measures to guarantee the public tranquillity." The person or persons in whose hands the local authority is: suppose, then, his own conduct among the proposed subjects of complaint—his own conduct, or that of any person or persons to whose power or influence he stands subjected, or that of any person or persons

who stand subject to his power or influence, unless they happen to have incurred his displeasure: this indispensable permission when and how often will it be given to it?

In the whole kingdom, or in this or that part of it, suppose these functionaries, all or any of them, in a league to betray their trust, and abolish or otherwise render of no effect all that is good in the constitution, how many of these assemblies will respectively be permitted to be held?

Take the necessary measures? O yes, *that* he will. Of those who would have attended the meeting, he will exclude one part—he will keep the rest under a guard. By this means, those, and those only, will be there, who are of the same way of thinking, or at least of speaking. "Measures to guarantee the public tranquillity." O yes: doubt not but that by measures such as these, the public tranquillity will be preserved. As to permission, —in every case in which there is neither need of, nor use in, any such public meeting, *permission* will be ready for it: in every case in which there is need of it, or use in it, *punishment* will be ready for it.

"Art. 4. Nevertheless these societies, authorized by the competent authority, will not be regarded as corporations."

So then, according to the honourable gentleman, if men, in any number, however great or ever small, are but suffered to meet together, whether at stated times or by accident, for the purpose of conversing, and conversing accordingly, on the state of the nation, there needs no more to constitute them *a corporation:* to constitute them a corporation — or at least to give to the assembly an appearance so near to that of a *corporation*, as to produce a danger of its being taken for such, and *that* with mischievous effect.

Lawyer or non-lawyer, in the mind of the honourable gentleman, can it really have been a subject of belief, that, by any such means, in the sense put upon the word *corporation* by the law of his country—by the Rome-bred law, or by any other sort of law—a *corporation* would or could thus be constituted, or that to any other reflecting mind it could be taken to be so? I have tried hard, but I have not as yet been able to find in any such supposition the faintest colour of probability. But if not, —I grieve to think of it— what is the consequence? That, on the occasion of the *insinuation* thus conveyed for the purpose of gaining his point, and deluding into an acquiescence with a liberticide law his colleagues of the Cortes and the Spanish people their constituents, he had recourse to misrepresentation, wilful and studied misrepresentation. To the people, to induce them to sit still, and, without previous remonstrance or subsequent complaint, see themselves deprived of a real and indispensable security, he held up to view a danger purely imaginary, and known by himself to be so: at the same time, to effect this liberticide purpose, he scrupled not to use his endeavours to cause those whom he was depriving of their liberty to be regarded as a set of conspirators and usurpers, conspiring to assume and exercise an illegal power, for the purpose of employing it in acts of hostility against the government.

Oh but, as often as it pleases the local authority that any such assemblies shall be held, and to give permission accordingly, held they will be, or at least may be. Oh yes, that they may; held in Spain they may be, and so they may be in Morocco.

The Emperor of Morocco, —is he in want of a prime minister? Let Mr. Goreli tender his services. But, perhaps, he may be provided nearer home.

But the law is Mr. Goreli's, and he has given us his reasons for it. Let us see them. [From the Traveller, 21st September 1820: Madrid, Sept. 6. — The Cortes— Sittings of the 4th.]

"M. Goreli allowed that the members of the societies and their objects deserved respect and confidence; —2. That they took every precaution to admit none but persons of upright intentions and devoted to the constitution; —3. But that they were exposed to be taken by surprise by some, who, under the appearance of patriotism, *might* lead them to impolitic conduct."

Such are the premises: and his conclusion is what has just been seen.

And is it come to this? And did such logic then come from Spaniards?—and without fear of universal indignation, could it thus be presented to Spaniards? And so it is from these premises, that this same practical conclusion has been derived! These societies are to be annihilated! All societies of this description—all that now exist, and all that would otherwise have existed, plunged together, and forever, into one and the same bottomless pit—consigned for ever to annihilation!—People of Spain! this same logic—would you see it in its true character? This you may do, and without much difficulty. Apply it wherever else it is equally applicable, and observe the effect of it. Apply it then to the Ministry, —you annihilate the Ministry: apply it to the Cortes, —you annihilate the Cortes: apply it to the Monarchy,—you annihilate the Monarchy. Yes, the Monarchy; for was there not a monarch once, who was not merely "exposed to be taken," but actually "taken by surprise?" But why thus spend time in taking men one by one? Apply it to human kind, you annihilate human kind. Would you give a top to the climax—apply this same logic to the maker of it: apply it to Mr. Goreli, you annihilate Mr. Goreli. For is not even Mr. Goreli *exposed* at least to be

"*taken by surprise*," and "*led into impolitic conduct?*" Ah! why was it not applied to him — this logic of his — and applied with somewhat more than *logical* effect, before he introduced this law? Was it that even *he* was taken by surprise, when he was "led into the conduct" manifested by the framing and proposing of such a law? Ah no! I see but too much of *reflection* in it — but too little of *surprise*.

"Deserving of respect and confidence," — themselves as well as "their objects:" — "careful to admit none but persons of upright intentions, and devoted to the constitution:" — "exposed," but only exposed "to be led to impolitic conduct:" — led by *some*, but only by *some*, "among them," and by them no otherwise than by being "*taken by surprise*:" — such, according to Mr. Goreli, is the general character — not only of the societies, but in each society, that of the members! Such their character, and, notwithstanding their being all this — if not for their being all this — for this it is that they are annihilated! What had their characters been the very opposite of all this? — what worse could, even in that case, have been done to them? And because in — it is not said how small — a number, they are *exposed* to be taken by surprise, their general excellence being at the same time thus admitted and proclaimed — it is for this, *that* not only all that *exist* are at once to be consigned to nihility, but all that otherwise *would* have existed.

Well, then, the "impolitic conduct" they are exposed to be led into, together with whatever mischief might have been the result of it — what would have been the cause of it? "*Surprise*," answers Mr. Goreli himself — their "*being taken by surprise*." Well; and suppose them *not* so taken, what would have been the mischief? I answer — there would not have been any: even Mr. Goreli does not say there would. Against *surprise*, then, is there no other remedy — no remedy less drastic — than annihilation? Under the name of *warning*, does not the nature of the case present a somewhat better known and better approved, as well as milder remedy? Thinking as Mr. Goreli declares he thinks of them, some men in his place would have preferred *giving warning*. Mr. Goreli applies *annihilation*.

On this occasion, as on all similar ones, behold the same inexorable passion, and the same course taken by it: the elevation gained, at the first opportunity the ladder by which it was gained, is kicked down. On this same occasion, this is more explicitly confessed by other speakers. Excellent things those same societies, while occupied in laying the foundation of our power: deserving of annihilation, the moment it is perceived that, from the same useful and so lately necessary instrument, that same power is exposed to feel a check.

Take warning, Neapolitans! take warning, Portuguese! for warning you shall have; and for your beacon, you shall have the Spanish Cortes, with Mr. Goreli speaking the sense of it. Take warning — I know not whether to say, Spaniards! — for, alas! for *you*, I fear, it is too late: unless, by favour of Spanish dispatch, some of the elements of the La Isla army should still continue undissolved.

Still the same division — the same most simple and commodious division — of human kind into two classes: the *good*, those by whom our purposes are served; the *bad*, those by whom they are thwarted: and, no sooner is it seen or thought, that the *good* creatures, who till this moment served our purposes, thwart them, than their essence is changed, and they are become *bad* ones. Yes: this is the division you may see made by legitimacy all the world over. *Above*, all excellence; *beneath*, all depravity. Such is the arrangement — the systematical arrangement — of which Despotism is the Linnæus. In the English statute book, not a page in which it is not assumed and acted upon. Most excellent Majesty! O yes! most excellent: but Most Excellent in what? And from Majesty down to simple Knighthood runs the scale of excellence.

Spaniards! would you wish to see the difference between a despotic government and an undespotic one? You shall see it in few words. It was not made for *this* purpose; it was not made for *a* purpose; it was made for *all* purposes. Be this as it may, if it be admitted (the account thus given of this difference,) the sort of government which, by this law of his, Mr. Goreli has been endeavouring to establish — and, I much fear, has ere now established — is a *despotic* one. Yes: notwithstanding everything that is to be found in your constitutional code, a despotic one. The letter of that code may be left to you, and still the government may be a despotic government.

Would it be agreeable to you, moreover, to have at hand a *test*, by which the partisan of a despotic government and the partisan of an undespotic government, or (to use a more common phrase) a lover and a hater of liberty may be distinguished? Such a test you shall see: and if you approve of it, occasions will not be wanting for making application of it.

Time presses, space is wanting. The form I give it in must be as compressed as possible. It will not be a substitute to thinking, but an excitement. Be indulgent: be expectant: I cannot, in so narrow a space, do the argument anything like full justice.

Spaniards! behold, then, the distinction

between a government that is despotic, and one that is not so. In an undespotic government, some *eventual faculty of effectual resistance*, and consequent change in government, is purposely left, or rather given, to the people.

Not inconsistent with government—on the contrary, indispensable to good government, is the existence of this faculty. Not inconsistent: for so experience, as you will see, proves.

Next to nothing is the danger from the existence, in comparison with that from the non-existence of this faculty. Everywhere, and at all times, on the part of the subject-many, howsoever treated, exists the disposition to obsequiousness. *Birth*, observation of the direction taken by *rewards* and *punishments*, by *praise* and *dispraise*, of the habit and language of all around;—by the concurrence of all these causes is the disposition produced, and kept up.

To alter or weaken this disposition, in such sort as to produce revolution in government, or considerable mischief to person or property of individuals, nothing ever has sufficed, or ever can suffice, short of the extremity of misrule.

Upon this principle alone could, or can, the English revolution be justified.

Upon this principle alone can the like change in Spain be justified.

No such past change can be justified, but by a principle by which the justification of all future change in like circumstances is already made.

Of a government that is not despotic, it is therefore the essential character even to *cherish* the disposition to eventual resistance. On some other occasions you shall see—such of you as will honour my pages with a glance—how effectually and pointedly that indispensable element of security has been cherished; cherished by the only government that stands upon a rock—the government of the Anglo-American United States. Meantime see to this purpose—such, if any of you, as have in hand the means—the liberticide Act of Congress, *approved July* 14, 1798; not forgetting the marginal note indicating the glorious *expiration* of it.

Instruments necessary to the existence of such a disposition, in a state adequate to the production of the effect, are *instruction*, *excitation*, *correspondence*. To the understanding applies instruction; to the will, excitation: both are necessary to appropriate action and correspondent effect; instruction and excitation, in the case of each individual taken separately; correspondence, for the sake of concert amongst the number of individuals requisite and sufficient for the production of the ultimate effect. Co-extensive with the instruction and excitation must be the correspondence: and therefore, as far as depends upon the government, under the government, if not a despotic one, will be the facility allowed and afforded to correspondence. When, to a national purpose, exertions on a national scale are necessary, exertions made without concert (need it be said) are made without effect.

By instruction, excitation, and faculty of correspondence—by these three instruments in conjunction, and not by any one or two of them alone—can the national mind be kept in a state of appropriate preparation—a state of preparation for eventual resistance. It is by the conjunct application of all these instruments, that minds are put and kept in a proper state of discipline, as bodies are by the military exercise.

From this state of full and constant preparation, result two perfectly distinct, though so intimately connected uses:—1. Effecting a change in government, if ever, and when necessary; 2. In the meantime, preventing, or at least retarding, the necessity, by the constant application of a check to misrule as applied to individual cases—to misrule in all its several shapes.

Necessary to instruction—to excitation—in a word, to a state of preparation directed to this purpose,—is (who does not see it?) the perfectly unrestrained communication of ideas on every subject within the field of government; the communication, by vehicles of all sorts—by signs of all sorts; signs to the ear—signs to the eye—by spoken language—by written, including printed language—by the liberty of the *tongue*, by the liberty of the writing-*desk*, by the liberty of the *post-office*—by the liberty of the *press*.

The characteristic, then, of *an undespotic* government—in a word, of every government that has any tenable claim to the appellation of a *good government*—*is*, the allowing, and giving facility to this communication; and this not only for instruction, but for excitation—not only for instruction and excitation, but also for correspondence; and this, again, for the purpose of affording and keeping on foot every facility for eventual resistance—for resistance to government, and thence, should necessity require, for a change in government.

In all this there is nothing new: nothing that is new, either in theory or in practice. Look around you, my friends, you will see it in theory, and at the same time in correspondent practice. In the Anglo-American United States, everybody sees it is in practice. In that declaration of independence, which stands at the head of their constitutional code, anybody may see it plainly and openly avowed. Not that I wish to be understood as holding up as a pattern, the *logic* of that document. But, at any rate, there is *thus much* in it

of *good politics*. After speaking of certain "*ends*,"—meaning, beyond dispute, though not very appositely expressing, *the greatest happiness of the greatest number*, (a phrase for which, upwards of fifty years ago, I became indebted to a pamphlet of Dr. Priestley's,) it proceeds to say—"Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government." Thus it is, that in express terms, and with the most direct and deliberative intention,—thus it is, that with discernment as well as magnanimity till then unexampled —*that* government—(a government under which, during the forty years that it has been in existence, there has been more felicity—more undisturbed tranquillity, than during the same period under any other,) *that* government, let it never be out of your minds, has, with its eyes open, and with its own hands, laid the foundation of eventual resistance to itself. Even in England, even in the records of the English parliament, may be seen something of a show of it. At the time of the revolution, those who bore a part in that change saw their convenience in holding a sort of language from which the same conclusion was drawn; namely, that a state of things had at that time already taken place, and was therefore capable of taking place,—was then in contemplation, and therefore might and ought to be, upon occasion, taken again into contemplation—in which it might be right that the people should take the government into their own hands: an operation which, of course, could not be performed without *resistance* to the government then in existence. The logic, indeed, was in this case still worse than in the American case. For a falsehood was asserted: and that a notorious one; namely, that the king had entered into a contract with the people: whereas, to the perfect knowledge of all who said he had, he had never done any such thing: that having entered into such contract, he had broken it: and that by so doing he had abdicated the government: while, as everybody knows, he was clinging to it with all his might. Thus (as may be seen in their journals) said the House of Commons: and thus, after kicking against the lie in vain, said at length the House of Lords. The lie was the work of lawyers; for without a lie in his mouth, an English lawyer knows not how to open it. But though being, as it was, an untruth, the antecedent in this argument was unable to give any just support to its consequent, or to anything else; the consequent was in itself good: and in *that* we have all that is to the present purpose.

So much for the difference, or distinguishing criterion, between a *free government* (or, to speak more clearly though less familiarly,) a *non-despotic* government, and a *despotic one*.

Now for the promised *test*, by which, when applied to a man, it may be seen whether the government he means to give his support to is of the one sort or of the other. Put to him this question.—Will you, sir, or will you not, concur in putting matters on such a footing, in respect to the liberty of the press, and the liberty of public discussion, that, at the hands of the persons exercising the powers of government, a man shall have no more to fear from speaking and writing *against* them, than from speaking and writing *for* them? If his answer be *yes*, the government he declares in favour of, is an *undespotic* one; if his answer be *no*, the government he declares in favour of, is a *despotic* one: if yes, his principles as to this matter, are those of the Anglo-American United States, and, as you will see, if you have not seen already, those of the Spanish constitutional code: if no, they are those of ————————, and of the Emperor of Morocco.

Various are the modifications of which meetings for the purpose of political discussion are susceptible. All of them are more or less contributory to both purposes at once—to instruction and to excitation; but some of them are more particularly suitable to the one purpose, others to the other: some have more, some less, of the colour of dangerousness upon the face of them. If, at the expense of general utility, particular anxieties were to be conceded to—if a door were, in that case, found necessary to be left open to compromise, it might be worth while to bring to view the circumstances by which these several modes of communication stand distinguished: it might be worth while to propose this or that succedaneum, by which the anxieties might be calmed, without quite so costly a sacrifice, as the sacrifice of liberty on the altar of despotism.

But Mr. Goreli is inexorable: the principle he has displayed excludes all compromise. Whenever he sees either excitation or instruction, there he sees an enemy. *Meetings?* Oh yes—in any number, and everywhere. Meetings? Oh yes: but on what terms? on condition of their being everywhere under the yoke of a licence—on condition, that is to say, that, on all occasions, the instruction and the excitation shall be all on one side; all on one side, and that, of course, the side of the ruling few—the side which calls for passive obedience and non-resistance—the side, in a word, that stands in constant opposition to the only side, on which it is in the nature of the case that they should be of any use—to the only purpose for which they are in demand.

Not but that in all this Mr. Goreli is perfectly consistent; nothing can be more so.

The government he has in view—the government, the establishment of which is the object of these his endeavours, is of the *despotic* species. Spaniards! see whether I do him wrong;—see whether the object of these his endeavours be not to exclude all possibility of change, unless it be such as the people, seeing it to be for the interest of their rulers, and against theirs, would, if left at liberty, manifest their disapprobation of;—see whether it be not to exclude from misrule, how consummate soever, all means, and thereby all possibility of correction—from misery, how excruciating soever, all possibility of relief.

Not yet has he proposed the abolition of election meetings in their earliest stage—of those meetings of the subject-many in all their number, and, to outward appearance, in all their force. No: nor is any such change needful for the accomplishment of his purposes. Destitute of that necessary mental discipline which has just been brought to view—strangers to all instruction, to all excitation, to all political correspondence—meeting, the electors will meet and act like puppets, obsequious to this or that official showman's hand. At the time of giving their votes, the code itself inhibits all discussion, and with it all instruction and excitation: and now it is that Mr. Goreli, coming upon them with this law of his, deprives men of all other opportunities of learning the mental exercise—that instrument of independence by which alone the man is distinguished from the puppet.

LETTER III.

On the Liberty of Public Discussion in Free Meetings—Continuation from Letter II.

SPANIARDS! I continue.—The subject is of too great importance to be dismissed, while the mass of documents with which it has furnished me, remains in any part unexamined. In my last you had some remarks of mine on the proposed law itself—"the law regarding public societies," as proposed to the Cortes on the 21st September by Mr. Goreli, in the name of the commission charged with that subject; those remarks being followed by some others of mine on a speech of that same honourable gentleman, which, though delivered so long before as the 4th of that same month, exhibits the considerations which, in the character of *reasons*, had been employed by him to pave the way for the reception of this same proposed law.

On that same occason, namely, that of September 4th, I see exhibited, for that same purpose, reasons from two other public functionaries; viz. one of the king's seven ministers—the minister of the colonies (so I see him styled) and Count Toreno, then and now a member of the Cortes, and since then president.

I begin with the *Minister of the Colonies*. By this official name I find him designated, and not by his proper name. This mode of designation is a real relief to me. It would have been no small one, to have found Mr. Goreli thus anonymous. This relief is, with great prudence, provided for debaters by the tactics of the English parliament. The sound of a man's name, from the mouth of an antagonist, whose utmost powers are at that moment put to the stretch in the endeavour to sink his reputation, is a cause of irritation against which neither habit nor philosophy, nor both together, can sufficiently arm his patience.

Next in order to the proposer of the proposed law, to which, at the end of seventeen days, this debate gave rise—next in order in the debate to Mr. Goreli, but much more abundant (as will be seen) in length and detail, comes the so happily unnamed minister of the colonies.

1. He too is "anxious"—manifestly not less anxious than Mr. Goreli—"that every Spaniard should enjoy full liberty." Yes; but what sort of full liberty? That sort, of course, which is, or is to be, "founded on the law." On the law? Good. But on what law? On that which we have seen already, on the law, which, in embryo, that representative of the people, and this minister of the king, bore each of them, in his breast: the law which I had to lay before you in my last: the very proposed law by which, as you have seen, that same full liberty is proposed to be so fully destroyed.

2. Notwithstanding such anxiety, the anxious gentleman "could not admit the existence of political associations without dependence on the government, and without responsibility of their members." Could not admit of this? No: that I will be bound for him he could not: just as little as I myself could, were I in his place. But what is this to the purpose? As much as if he said he could not admit of rape or robbery. But his inability to admit of rape and robbery could not have afforded a passport to an insinuation which, if produced in the shape of a direct assertion, would have been seen to have been as completely groundless as it was false; it would not have afforded a passport to the assertion: no, nor so much as a cover to the falsity of it. What! by meeting and talking together—let the subject of their talk be what it will, in a room or out of a room, in any number, small or great—do a company of unarmed men become, or it is possible they should fancy themselves to be, *independent*

of the government under which they thus meet? *independent* of that same government, and exempt from being "*responsible*" to it? Any one of the societies in question, on any charge of specific delinquency, — would an officer of justice have found any greater difficulty in obtaining entrance into it, than if the subject of their conversation had been confined to plays or bull feasts?

3. The candour of this faithful servant of his Majesty is truly admirable: not less so than that of the representative of the people. "I know well," he added, says the report, "I know well that these associations owe their origin to a laudable object."

4. "And that to them," continues the speech, "we owe the acquisition of the good we enjoy." Is it in the power of words to wind up candour to a higher pitch? But, my friends, you have seen already what is at the bottom of it.

Such being the grounds made for gratitude, see, in the next place, the grounds made for annihilation, in proof of gratitude.

5. "But the means," it continues, "which have been employed to acquire it" (to acquire that same good,) "far from being conducive to its preservation, would be the great obstacle to its consolidation." Well: here is assertion; and assertion directly to the point: this is the very thing which, to afford a justifying reason for the proposed law, required to be proved. But the proof, where is it? Go on a little further, and you will see — if not a proof, that which it has been gentlemen's endeavour to cause you to accept for proof. As to probable mischief, in any determinate shape, not any the slightest attempt is made to prove it. Instead of listening to a proof, what he depends upon your doing is, the taking the thing for granted, without so much as an attempt at proof. Why no such attempt? For a perfectly plain reason: because success was, in every eye, impossible.

But if no such proof was brought by him (and you will see whether there was any,) mind the logic of this his argument. By these societies it is that all the good that has been done, has been done. Till this moment, by these same societies, nothing but good has been done. Now for the conclusion — left as it is to be collected from the proposed law: therefore, says this conclusion, by these same societies, if suffered to subsist, nothing will be done but what is bad, — absolutely bad, or at least, when weighed against the good, preponderately bad, in future.

But he does not end here. For now comes a tissue of irrelevancies, in which, in virtue of the confusion in which it promised to involve men's minds, he evidently puts his trust. Mark well the suspicions which by means of it he seeks to infuse into them: mark whether for any of these suspicions he has been able to make so much as the smallest ground.

6. "What comparison is there," continues the speech — "what comparison is there between individual liberty, and that which may be arrogated to themselves by permanent juntas, with peculiar constitutions, secret sittings, dignities, offices, and funds?"

"What comparison?" What means he by *comparison?* What has it to do with the question? Who ever made any such comparison? If there were any meaning to the word, these are the questions, by the answers to which it might be brought to light. But meaning it has none. If *individual liberty* must be spoken of, that which the societies in question had been doing with it *was*, the applying it to that constitutional purpose, of the goodness of which his testimony has been so explicit.

Does he think, by this question — does he think to make you believe, that by preventing you from meeting in societies with these good things in them, no restraint upon your *individual liberty* will be imposed? If not, then by what else can any restraint be imposed upon it? Mistake me not, my friends, so far as to suppose me passing condemnation on a law, as some have done, on no other ground than that of its being a restraint upon individual liberty: it is only by being such, that laws can be laws.

Putting aside these inanities, in the production of which there is no saying in what degree the reporter and the translator may not have had their share — putting aside these debatable points, let us take up the argument: — it is this.

"The societies in question have in themselves permanent juntas, with peculiar constitutions, secret sittings, dignities, offices, and funds." Here we have the *antecedent.* Therefore, says he, they would, if suffered to exist, "be the great obstacle to the consolidation . . . of the good we enjoy." Here we have *the consequent.*

Here, then, we have so many elements, of an unnamed something, by the instrumentality of which, the mischief to which he thus makes allusion would, but for his remedy (he would have you to think) be produced. To this unnamed and undescribed something, by which such prodigious effects would have been produced, I will, under correction, for the purpose of considering whether it be in the nature of the case that it should be composed of such elements, any or all of them, give the name of *power: political power*, if of itself the name of *power* be not sufficiently explicit.

I beg his pardon. Looking out for substantial political meaning, I have overlooked that which is presented by grammatical rules. True it is, that for its indisputable proper

grammatical *antecedent*, the *relative pronoun-adjective* "*that*" has the noun-substantive "*liberty*," as modified by its noun-adjective "*individual*." But it was by my too good opinion of his logic, that my attention was then called off from his grammar. "What comparison is there between individual liberty?" says he—(he means individual liberty at large)—"what comparison between it, and that which may be arrogated," &c.?—What comparison? My answer is, *that* comparison which there is between *a genus*, and a species of that same genus: if by *comparison* he means *relation*—as I suppose he does, if he means anything—taking this for his meaning, his argument stands thus:—"In your opinion," says he, speaking to the Cortes—"in your opinion, *all* restraints upon individual liberty are bad things." And so they are in mine. But it does not follow, that a restraint upon this individual liberty which I am restraining, is a bad thing: for a restraint upon individual liberty in this shape, is not a restraint upon individual liberty in any shape.

But, putting aside nonsense, and determined to have sense to argue with if possible, I put aside individual liberty, and return to the word *power*: political power.

As to this matter,—power, and *that* pure from all responsibility, and from all dependence on the government,—this is what, according to him, these societies were thus arrogating to themselves.

The essence of this sophistry consists in a *name*—in the name given by him to the one first mentioned by him of these his pretended elements of "independent" and "irresponsible" power, arrogated to themselves, if you will believe him, by these societies. *Permanent Juntas* is the name he, on this occasion, gives to them. For what purpose? I answer (as you, many of you, cannot but have answered already,) for the purpose of assuming as proved, and causing you to regard as already proved, the very thing which he was professing to prove: and thus causing you to regard as proved, that which neither by him had been, nor by anybody else could be, proved. In your constitutional language, *Junta* is a name given to societies by which power is really exercised: *Junta* is a name which I have observed given to societies, by which, for a time, even the supreme power in the state has been exercised. In the ambiguity of this appellative—in the misrepresentation conveyed by the use here made of it—consists the sophism, in which the main strength of his argument lies. This irrelevant sense set aside—what, in its original sense, means "Junta?" A set of men who, for any purpose whatsoever, are *joined* together. This is its generical and widest sense. But, by omission or abridgment, it has come to be used moreover in a limited sense—in that limited sense in which it designates a set of men joined together for the purpose of exercising *power*. In this one word, then, behold here the whole strength of his argument—of this argument which he thus insinuated—and for the absurdity of which he seeks a cover in the use he makes of this ambiguous word. The persons in question are *joined together;* therefore, they are joined together for the exercise of power, and that power, as he had before insinuated, "independent" and "irresponsible."

Still there remains the word *permanent*. If, by constituting themselves *juntas*, the societies in question did not constitute themselves "*juntas arrogating to themselves power independent of government, and irresponsible*," let us see whether they did so by constituting themselves *permanent juntas*. A junta which, after meeting once, has *not* met a second time, has *not* been a permanent junta. But a junta which, after meeting once, *has* met a second time, *has* been a permanent junta. This indeed has been but a small degree of permanence. it has been even the very smallest degree; but still it has been *permanence:* and whether, by the smallest degree of permanence having place in a junta which, at its first meeting, arrogated to itself no power, any power is arrogated, any one may be left to judge. And so, if instead of two meetings, it has had two thousand.

As to "*peculiar constitution*, *funds*, and *offices*," to say of these societies that they had these things, is nothing more than to say that they were *societies*.

2. "*Peculiar Constitution.*"—If the society have an object, be that object ever so perfectly innoxious, some mark or other must the society have to express the object, and to distinguish the members of the society from the same number of men taken at random as they pass along the street; as also from other societies, whatever these may be. Having this, every society must, on pain of not being a society, have a peculiar constitution. Here, then, the right honourable gentleman sees *that* element of independent power which he calls *peculiar constitution*.

3. "*Funds.*"—If, in the society, a memorandum is to be made of anything that has passed,—it follows, that for making the memorandum there must be pen, ink, and paper, or something equivalent. But neither pen, nor ink, nor paper, are to be had for nothing. Here, then, the right honourable gentleman sees the element of independent power called *funds*.

4. *Offices:—collector's, treasurer's, receiver's, secretary's, president's.*—If to obtain the purchase-money for the pen, ink, and

paper, a *quarto* from each member be requisite, and the *quartos* are not all paid at the same moment, here must be a *Collector:* if there be any person by whom the money, when collected, is kept till it is employed in the purchase, here we have a *Treasurer:* if there be any person, who receives it, or any part of it, on its way from the *collector* to the *treasurer*, here we have a *Receiver*: if there be any person whose more particular business it is to make use of the pen, and ink, and paper, for taking the memorandums, or for any other purpose, here we have a *Secretary:* if there be any person whose more particular business it is to prevent disorder in the conversation, here we have a *President:* if neither these nor any other denominations are employed, the *functions* are not the less exercised. Here, and in most formidable abundance, the right honourable gentleman sees the element of independent power called *Offices.*

5. *Dignities.*—What the *dignities* may have been, which the right honourable minister had in view, I cannot pretend to say. In the four preceding articles, I have indicated so many ingredients necessary to the composition of every society for public discussion, be the topic what it may, on pain of its not being a society. Of *dignities*, this is more than I can pretend to say, without the help of a distinction. If, and in so far as the *office*, be it what it may, is regarded as a mark of *illustration*, causing the owner of it, as such, to be regarded with more respect than if he were not so, — on this supposition, indeed, so many *offices*, so many *dignities.*

All this while, true it is, for aught I can pretend to say, in this or that society there may have been this or that individual, bearing or not bearing an office — there may have been one, or even more, by whom, at the desire of the rest, this or that mark of illustration has been possessed. But with regard to the present purpose, by any such mark of illustration how is the case varied? If by the possession of it, so it were that a man possessed anything that could be called *power*, the persons over whom, and in relation to whom, it was exercised, would be the members of the society: but even over *them*, how is it, that by the bare possession of this dignity, whatever it be, anything that can be called *power* is or can be exercised? It cannot, then, give power even when applied to *them:* how much further, then, must it not be from giving any such thing, when applied to anybody else? Here, however, may be seen all that the right honourable gentleman has for his element of independent power called *dignities.*

6. *Secret Sittings.* — As little do I know — and I care almost as little as I know — whether, in the instance of any one of the societies by which such alarms were produced in so many right honourable breasts, there were any sittings that could with propriety be called *secret.* Here, however, a distinction requires to be made: not a little depends on the circumstance of *time — relative time. Secresy* imports fear: it is even conclusive evidence of it. Where the secresy has for its accompaniment a design, whether good or bad, it at any rate imports fear of miscarriage, supposing *that* known which is endeavoured to be kept *secret.* Now then, if it was only while the society in question was engaged in the pursuit of the object which he had in view when he was honouring it with the epithet of "*laudable,*" it was while they were engaged in the endeavour to free *him* as well as themselves from the yoke of that oppressive power, to which *that* milder power, in the exercise of which he is bearing a part, and which he is making this use of, has succeeded. On this supposition, the secresy had for its cause fear of oppression, fear of being oppressed by the hands which were at the same time inspiring *him* with the same fear. On the other hand, if the time was no other than *that* during which the power was wielded by him and those with whom he acts, the fear had for its object oppression by the hand of himself and colleagues. If, then, during this latter period, any such secresy in the sitting of any society for political discussion had place, the secresy having necessarily fear for its cause — this being supposed, if I were to learn, that of that fear *he* had been the object, and his conduct the source, — if I were to learn this, — judging him from all I know of him, which is this speech, and the proposed law in the support of which it was employed, — my wonder, I must confess, would not be great. On the one supposition, he inflicts punishment for benefits received by him: on the other supposition, he first makes the crime, and then punishes it.

Be this as it may — supposing him really alarmed, and the secresy, and nothing but the secresy, the object of his alarm, the way to quiet it was, to put an end to the secresy. But his object was, not the putting an end to the secret sittings of the societies, but the putting an end to the societies themselves: and this his proposed law but too sufficiently proves. His object was the putting an end to all societies in which any such "individual liberty" should be exercised, as that of representing his measures and designs in any such light as that in which they have presented themselves to the eyes of an impartial observer, viewing them at this distance. For, of everything of that sort, the tendency, how faint soever — the tendency, if it has any, is to oppose an "obstacle" to what he calls

"*the consolidation* of the *good*" of which he and his colleagues are in the *enjoyment*—the good of which, by the means that you have here a sample of, they are thus labouring for the increase.

"All these criticisms," some will be forward enough to say—"all these criticisms are minute and trifling: criticisms on logic, criticisms on grammar: mere criticisms upon words." Yes: considered merely in themselves, and without regard to the result indicated, they are as trifling as you please. But if the result be regarded, few things can be further from being trifling. For the result indicated,—is it not that the functionaries in question had for their object the substitution of a despotic government to the indespotic government, of which your Constitutional Code affords so well-grounded a promise?—that they were not themselves in an error, but occupied in the endeavours to deceive their colleagues, and to deceive you?—and that in this design it was, that they wove and employed this web of sophistry, which, otherwise than by such verbal criticisms, the nature of the case did not allow to be unravelled?

Gratified, my friends—most sincerely gratified should I be, to find these my remarks as groundless as, in my present view of it, that conduct is to which you have been seeing them thus sincerely and anxiously, howsoever mistakenly, applying themselves.

My friends, I have not yet quite done with this proposed law and its supporters. The messenger presses. But even already I can venture to propose two subjects for your consideration:—Whether, under a government professing not to be despotic, a law more mischievous in its complexion as well as tendency was ever proposed: and whether any law could be proposed on grounds more consummately frivolous.

Looking for the authority of example to supply the deficiency of reason, the right honourable gentleman gives you an account of England. A more complete misrepresentation has not been often given. This I hope to show you in my next.

LETTER IV.

On the Liberty of Public Discussion in Free Meetings—Continuation of the subject from Letter III.

SPANIARDS! I continue, and (I hope) conclude.—In my last on this subject, I left unexamined so much of the speech of the Minister of the Colonies as regards England: this together with the speech that bears the respected name of the Conde de Toreno:—

"In representative governments," adds the Minister of the Colonies—"England, for instance, there are also societies; but they meet for one determined object, and when that is finished, they are dissolved. But permanent societies are *unknown*, unless authorized by the law, and when they have this character, the government will be the first to support them."

1. "In representative governments," says he—"England for instance." But why take England for his instance? Spaniards, I will tell you. Because, if it be the object of a minister to put or keep in the condition of a despotic one, the government of which he forms a part, England, with its government, is the country which, at this moment, will in a more particular manner suit his purpose. Oh yes: it will give him a model, and as complete and serviceable a one as if he himself had the making of it.

England a *representative* government indeed! Oh yes, *that* it is. But a representive of what? of the people? No: but of the Monarch and of the House of Lords. For in this government, divided, as the supreme power of it is, into three branches—the concurrence of which is necessary indeed, but at the same time sufficient for every considerable permanent measure,—the Monarch alone has one branch; the Lords' House another; the Commons' House the third. This being the state of things, if by the representative government he means a government containing in it a branch in which the *people* are represented,—in the English government there is no such branch. For in that last-mentioned House, little less than a majority of those who have a right to sit in it, are seated either by the Monarch or by some member of the House of Lords:—one Lord, for example, seats nine Members; and an overwhelming majority is composed of men seated by individuals whose particular interest, completely identified as it is with the joint sinister interest of the Monarch and the Lords, is decidedly and inexorably hostile to the interest of the great body of the people. Thus it is as to those who have a right to sit: but as to those who on the several occasions actually sit, the disproportion is always much greater: for, even of the few who might be honest if they were not idle, the greater part are, on each occasion, kept from being honest by their idleness. Nor, when they do sit, do they sit, any of them, but in the atmosphere of a corruptive influence, by which their particular interest is identified with the particular and sinister interest of the Monarch and the Lords. Yes, and that still more effectually than if they had merely been seated by them: all, with scarce one exception, being in the condition of men with bribes in their hands, given them by the Monarch, and

capable of being taken back by him at pleasure, or else upon the look-out for such bribes. This state of things is just as notorious as the existence of the two Houses themselves: nor does any one, even of those most interested in denying it, so much as attempt to deny it. For what purpose should he? The books in which the facts are manifested — manifested in names, numbers, and proportions—being in everybody's hands. In favour of it, all that is ever said is contained in this: — "So it has been and is; therefore so it ought to be."

All this while, what I cannot but confess, is — that in law *fiction* — that is, in liar's language — the government *is* a government representative of the people: and English lawyer's fiction, to which the character of lying belongs, or it does not belong to anything, is the acknowledged foundation of everything with us that is called *law*. In the language of lies, the government, then, *does* continue a body representative of the people: and, as the state of the case is scarce ever brought to view but by the misrepresentation made of it by this lie, and the vast majority of those who have faculty and leisure to make the distinction on such a subject between lies and truths, are paid for giving currency to this and other such lies, and for pretending to take them for truths (for scarce ever does a judge pronounce a decision, and never does a man go to church, without some notorious lie in his mouth;) — thus it is that the right honourable minister of ultramaria had really a colourable pretence for giving, on this occasion, the government of England as an instance of a representative government. If (as is the case, if I misrecollect not, in the government of the Netherlands, in regard to all the representatives) — if (I say) in England, the Monarch, openly, and in a direct form, did nominate five-sixths of the House of Commons, — even thus, if he left the remaining sixth to be elected by the people, so it were upon your principles of universality, secresy of suffrage, practical equality and bienniality, this would be no small improvement, and I would gladly vote for it. For, in this case, the habit of knowingly uttering and knowingly receiving lies as truths, would thus far be narrowed, and dishonest men could no longer join in assuring honest ones that the government is a government representative of the people, as, in so shameless a manner, they do now. Even if the Monarch did by the members of the House of Commons as he does by the Bishops — even if, after having appointed a *junta* for the purpose, he sent them a licence to elect whom they pleased, and along with it the name of a man, whom, on pain that should follow, they were to elect: this, even this, would be an improvement; for nowhere exists there any such impudence as to pretend to believe, that in this case it is by any such junta that the priest is put into a palace and made a lord of; that it is by the members of any such junta that he was thus made; or, in short, by anybody but the Monarch by whom *they* were made. The government would thus be more universally seen than at present to be what it is — a government uniformly determined by a particular and thence sinister interest, — an interest opposite to the interest of the people and to which the interest of the people is thus necessarily, and on every occasion, sacrificed.

"In *representative* government" indeed No, my friends: if it had been a government really representative that it had been his interest to direct you to an instance of, he knew well enough where to find one. He would have directed you to those rulers, by whose long-suffering and regard for the interests of *their* fellow-citizens (not to speak of your's) you have for so many years been saved from the additional miseries of an additional war: to a government, in which the interests of the ruling few and the subject-many are so nearly identified, that (were it not for slave-holding — the monster they are actually employed in combating, and the deceit put upon the people by their lawyers; with the English common-law and its lying fictions in their mouths,) misrule in any shape would be a thing utterly unexperienced: and, in what state the societies in question are under that government, I have already had occasion to inform or remind you in the first of these my letters.

But since the English is the government, for the practice of which he has actually referred you as affording an authority for his support in the course taken by him in the proposing of such a law, — follow him, my friends, to England, and see how far his account of the state of the law in that country quadrates with the truth.

"In England," says he, "there are also societies; but *they* meet for one determined object, and when that is finished, they are dissolved." My friends, look twice at this assertion, and then see whether it even stands in need of any external evidence to convince you of the incorrectness of it. In England, there exist not any societies — any societies whatever, existing for any purpose whatsoever — political or non-political (for thus all-comprehensive and unrestricted is the assertion,) that have any more than *that* degree of permanence, if *permanence* it can be called. Consider whether, in the nature of things, this can be true.

But lest that should not be sufficient — lest the assertion should not yet be broad enough,

he goes on and says — "But permanent societies are unknown, unless authorized by the law." *Unknown*, then, in England, if he is to be believed — not only *unexisting* but *unknown* — are all permanent societies: those included that have any beyond the smallest possible degree of permanence.

Permanent societies unknown in England! Even had he so far narrowed his assertion as to make it applicable to the purpose — even had he said "permanent societies *occupied in political discussions*, are unknown in England" — as well might he have said — sunshine is unknown in England.

To render intelligible the relation between the truth of the case, and the right honourable minister's account of it, I must beg your notice, my friends, for a distinction, which he knew better (it should seem) than to bring to view. This is — the distinction between the state of the government in question antecedently to the enactment of certain recent laws, and the state into which it has been put by means of them. Applied to the *recent* state, you will find his account possessing in part a colour of truth: applied to the *anterior* state, you will find it wholly destitute of all colour of truth.

In doing this, I must begin with giving a determinate import to a phrase of his: — "*authorized by law*." Speaking of England, "Permanent societies," he says, "are unknown unless authorized by law." Now, by *authorized by law*, what he means is — existing no otherwise than under a licence which the law necessitates; that is, to use the words of his proposed law, "under the permission of the local authority:" for as to the being authorized by law — meaning *real*, and not imaginary *ex post facto* law, — everything is left authorized by law, until it stands prohibited. This being the case, to constitute what he means by "*authorized by the law*," requires in the first place a prohibition — a general prohibition, and upon the back of that a special permission, exempting out of that general prohibition the special objects to which the permission applies. This explained, England being the country in question, how stands the fact? Before the year 1817, the things "*unknown*" were — not the *unlicensed* permanent societies, which *he* says were unknown, but the *licensed* ones, which his endeavour is — to make you regard as being coeval with the constitution: for till March 31st in that year, licences for meeting to talk politics in public were no more known in England than licences for meeting together to dine: and whether by ceasing to be permitted, societies such as those in question can in three and a half years cease to be "*known*" — of this, my friends, you will judge.

Thus much as to the being "*unknown*:" Now as to the being *in existence*. Even as to this point, the fact does not bear him out in his assertion, regard being had to the breadth he has given to it. *Permanent* societies being here in question, and not *ephemeral* ones (they forming the subject of another mode of regulation) the prohibition of permanent societies without licence is confined* to "places used for the purpose of delivering lectures or of holding debates." Thus stands English law: while, according to his account of it, the prohibition of meeting without licence extends to *all* "permanent societies" without exception.

Bad as it is — bad enough for the establishment of finished despotism — the English liberticide innovation, thus introduced into the English government by the professed abhorrers of all innovation, is not yet bad enough for his purpose: to raise it up to his purpose, you see how he gives to it an extent that does not belong to it.

In the breasts of the organizers of this English despotism, there was a something that put a restraint upon it as to *time*. In the first seditious meetings act, as above — the earliest commencement of the act being the 31st of March 1817 — the duration of it was not longer than till the 24th of July 1818; not so much as 16 months: in the second seditious meetings act (the other being expired,) the earliest commencement being the 24th of December 1819, the duration of it was not made longer than five years from that time; five years, with no other addition than that of an indeterminate fraction, extending however no longer than to the "end of the then next session of parliament."

This for the present satisfied English despotism: but this minister of *your* king, nothing less than an *eternity* of such despotism would satisfy *him*, or at least his supporter in the Cortes, Mr. Goreli.

"And when they have this character," concludes this speech, "the government will be the first to support them;" namely, permanent societies, without exception: this character; namely, the character of being, in the language of English law, *licensed* — in the language of the proposed Spanish law, in possession of "a permission from the local authority."

My friends, in this clause, short as it is, I see three erroneous notions presented for acceptance.

One is, that societies of the sort in question are *capable* of standing in need of support, in some shape or other, from government.

Another is, that government has it in its power to render service in some shape or

* Seditious meeting act, passed December 24, 1819, 60 Geo. III. & 1 Geo. IV. c. 6, § 26.

other to the public, by means of support given in some shape or other to these societies.

A third is, that, in some shape or other, support, meaning *special* support, may be *capable* of being given by government to the sort of societies in question, *without being* pernicious.

1. First, as to the *need* of support. Antecedently to any licence, they have for their support, the natural, original, unrestricted individual liberty. The members, as such, have no need of any other: as *men* they have indeed *need* of, but of course *have*, that protection, whatever it be, which the law affords to all other men. This is support, but not *special* support. Invade this liberty—narrow it by a *prohibition* — you thus indeed create in them the need of the *permission*, whatever it be, with which you will vouchsafe to narrow the prohibition. But when you have done this for them, you have done all they have need of, unless it be the easing them of the *prohibition*, of which, by the supposition, you will not ease them: do this, you have thus far replaced them in that original situation, in which, as above, no support was either needful to them, or of use.

2. Secondly, as to government's having it in its *power* to render any service to the public at large, by means of special support, given in any shape, to these societies.

3. Thirdly, as to the *disservice*, which government would do to the public at large, by means of, and in proportion to, support given in any shape, to these societies.

For these two points, one consideration may suffice. By support, in any shape, no service, I say, could government render to the public at large. Of support given to them in any shape, the effects, if any, with reference to the public at large, could not, I say, fail of being pernicious: for, according to the value of the support, the effect would be to diminish whatever service they might be capable of rendering to the public, if they were let alone.

Such is my notion of the matter: the following are the grounds of it: —

All the service capable of being rendered to the public by these instruments, is, as above observed, comprised in the two words *instruction* and *excitation*; — the excitation being no otherwise serviceable than as the instruction is so too.

But, of the matter of instruction, what is it, the dissemination of which, by any such means, is, or can be, of a nature serviceable to the public? This, too, has been already mentioned: indication of what is *amiss*, either in the texture of the government, or in the conduct of those to whom the exercise of it powers belongs. This, and nothing else.

"What! nothing else?" says somebody— "by the indication of what is *right* in both places, is no service rendered to the public?" I answer, No: none that can be rendered by these societies, over and above what would be sufficiently rendered without them. Whatsoever there is *right* in either place, there are always men in abundance to hold up to view. Mankind must change its nature, ere anything that is said in commendation either of government or of rulers, can fail to be generally acceptable to the aggregate composed of those same rulers. But, without need of being expressly offered, a mass of reward, composed of all the good things that are at the disposal of government, is, by every man, seen stationed over his head, ready to drop, in appropriate and adequate morsels, into the mouth of every man who will be at the pains of earning it, by signalizing himself in the defence of everything or anything, and every person or any person he sees established. Of these ready defenders, there never can be a deficiency, supposing *no* such societies in existence: of these same defenders, as little can there be a deficiency, supposing *any number* of these societies in existence. Thus it is, that even without the advantage given them by the restraint imposed upon their adversaries by the licence, and the fear of forfeiting it, things and persons that are established are, by the mere circumstance of being established, put into possession of an undue advantage: an advantage which the nature of their situation secures to them, how opposite soever their character may be to what it should be. As to everything that happens to be *wrong* in those same high places, for the indication of it there is *no* such reward; while for *defence* of it, there is, as we have seen, in prospect and expectancy at least, an infinity of reward. Thus stands the matter, even *without* the licence. As if that were not enough, comes the licence, and, in endeavour at least, not only leaves the evidence on one side of the cause without motives for bringing it forward, but, by an artificial door thus shut against it, superadds the forcible exclusion of it. Such is the system of procedure, according to which, at the bar of the public, its functionaries, while their adversaries are under the yoke of a licence, are tried.

"Government," concludes the speech, "will be the first to support them"— these same societies. Under this phrase lurks yet another fallacy as yet unexposed; namely, that even when the societies are thus licensed, thus corrupted, thus depraved, thus filled with the defenders, to the exclusion of the indicators, of abuse, government will be at the pains of taking any such active measures for their support. Of all such active

measures, it has just been seen that they are altogether needless. There, upon a shelf just over their heads, in goodly order — there, in men's imagination, stand the rewards; — there, without any need of special invitation, hands enough will be ready enough to grasp them.

All this while, that which, in speaking of the corruptive influence of licences in this case, is here said, should, it must be confessed, be understood as applying more perfectly to what it is in the conception of those *by* whom the yoke is imposed, than of the actual effect on those *on* whom it is imposed. What is scarcely possible is, that by the repressive influence of the licence, every manifestation of disapprobation, towards the conduct of those by whom the yoke is imposed, should, in every shape, be prevented. By degrees, a sort of language will come into use; a language that will be sufficiently understood for any such purpose as that of giving expression to complaint and indignation, yet will not be sufficiently understood for any such purpose as that of affording a tenable ground for the infliction of punishment.

Yes: in every apartment defiled by this liberticide yoke, the instrument of thraldom, the parchment or paper on which it is written, should be hung up on high — hung up in some spot universally conspicuous, with an appropriate accompaniment for pointing men's attention to it. By a single glance directed to this instrument of tyranny, eulogy might thus be converted into satire, — satire which, be it what it may, can never be too severe.

AN ESSAY

ON

POLITICAL TACTICS,

OR

INQUIRIES CONCERNING THE DISCIPLINE AND MODE OF PROCEEDING PROPER TO BE OBSERVED

IN

POLITICAL ASSEMBLIES:

PRINCIPALLY APPLIED TO THE PRACTICE OF THE BRITISH PARLIAMENT,

AND TO

THE CONSTITUTION AND SITUATION OF THE NATIONAL ASSEMBLY OF FRANCE.

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ESSAY ON POLITICAL TACTICS.*

CHAPTER I.

GENERAL CONSIDERATIONS.

§ 1. *General view of the subject.*

THE word *tactics*, derived from the Greek, and rendered familiar by its application to one branch of the military art, signifies, in general, *the art of setting in order*. It may serve to designate the art of conducting the operations of a political body, as well as the art of directing the evolutions of an army.

Order supposes an *end*. The tactics of political assemblies form the science, therefore, which teaches how to guide them to the end of their institution, by means of the order to be observed in their proceedings.

In this branch of government, as in many others, the end is, so to speak, of a *negative character*. The object is to avoid the inconveniences, to prevent the difficulties, which must result from a large assembly of men being called to deliberate in common. The art of the legislator is limited to the prevention of everything which might prevent the development of their liberty and their intelligence.

The good or evil which an assembly may do depends upon two general causes: — The most palpable and the most powerful is its *composition;* the other is its *method of acting*. The latter of these two causes alone belongs to our subject. The composition of the assembly — the number and the quality of its members—the mode of its election—its relation to the citizens or to the government;— these things all belong to its political constitution.

Upon this great object, I shall confine myself to observing, that the composition of a legislative assembly will be the better in proportion with the greater number of the points of its contact with the nation; that is to say, in proportion as its interest is similar to that of the community.†

In a treatise on tactics, an assembly is supposed to be formed; and the subject under consideration is only the manner in which its operations ought to be conducted.

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* This work is now first published in English, being edited from the work of M. Dumont, and the papers of Bentham.

† Four conditions are requisite to inspire a nation with permanent confidence in an assembly which is considered to represent it: — 1. Direct election; 2. Amoveability; 3. Certain conditions for being an elector, or elected; 4. A number proportioned to the extent of the country. It is upon these points that questions of detail multiply.

The election ought to be *direct*. If it be made by more steps, the people, who only elect the electors, cannot regard the deputies elected as their work; they are not connected with them by the affection of choice, nor by the feeling of power. The electors are connected with the people neither by gratitude nor responsibility; there is no approximation of the superior and inferior classes, and the political bond continues imperfect.

Amoveability is absolutely necessary. What is an election? It is a solemn declaration that a certain man actually enjoys the confidence of his constituents. But this declaration does not possess a miraculous virtue, which will guarantee the character and the future actions of this man. It is absurd to cause a whole nation to assert this grave foolery: — "We declare that these five hundred individuals, who now possess our confidence, will equally possess it whatever they do during all the rest of their lives."

The conditions to be required are of a more doubtful nature. Eligibility founded upon pecuniary conditions appears to turn upon a general distrust of individuals who cannot offer the pledge of property: they are considered as less attached to the established order, or less secure from corruption. The conditions required to constitute an elector, have for their object the exclusion from political power of those who are considered incapable of exercising this power with intelligence or probity; — they are precautions against venality, ignorance, and intrigue.

The number is an important consideration: legislative functions demand qualities and virtues which are not common; there is no chance of finding them except in a large assembly of individuals.

Legislation requires a variety of local knowledge, which can only be obtained in a numerous body of deputies chosen from all parts of the empire. It is proper that all interests should be known and discussed.

Legislation is not susceptible of direct responsibility. A small *junta* of legislators may have particular interests in making laws opposed to the general interest. It will be easy for the executive power to subject them to its influence. But *number* is a preservative against this danger. A numerous body of amoveable legislators participate too strongly in the interest of the community to neglect it long. Oppressive laws would press upon themselves. Even the rivalries which are formed in a large assembly become the security of the people.

In conclusion, if the number of the deputies were too small, the extent of the electoral district would render the elections embarrassing; and by reducing the value of a vote almost to nothing, would proportionally diminish the authority of the electors, at the same time that it augmented the relative value of the offices so much, as to expose the elections to the most violent contests and intrigues.

But there are points, with respect to which it may be a question whether they belong to constitutional law, or to tactics: for example, whether all the members should have the same rights, or whether these rights should be divided among them; so that some should have that of proposing — others, that of deciding upon a proposition already made; some, that of deliberating without voting — others, that of voting without deliberating; whether their deliberations ought to be public; whether absence ought to be permitted — and in case of absence, whether the rights of an individual ought to be transmissible to another; whether the assembly ought always to remain entire, or whether it ought to be obliged or authorized to subdivide itself.

I shall consider these questions as part of my subject, because it appears to me that their examination is intimately connected with that of the best rules to be followed in deliberation; — it not being possible to treat well of the latter, without referring to the others.

§ 2. *Ends that ought to be kept in view in a code of regulations relative to this head.*

The tactics of deliberative assemblies, as well as every other branch of the science of government, ought to have reference to the greatest happiness of society: this is the general end. But its particular object is to obviate the inconveniences to which a political assembly is exposed in the exercise of its functions. Each rule of this tactics can therefore have no justifying reason, except in the *prevention of an evil.* It is therefore with a distinct knowledge of these evils that we should proceed in search of remedies.

These inconveniences may be arranged under the ten following heads: — *

1. Inaction.
2. Useless decision.
3. Indecision.
4. Delays.
5. Surprise or precipitation.
6. Fluctuations in measures.
7. Quarrels.
8. Falsehoods.
9. Decisions, vicious on account of form.
10. Decisions, vicious in respect of their foundation.

We shall develope these different heads in a few words: —

1. *Inaction.* — This supposes that there are points which demand a decision, and which do not receive it, because the assembly is unemployed. The want of activity may arise from many causes; for example, if there be not sufficient motives to overcome natural indolence — if there be no pre-established arrangement for beginning business — if the assembly can only act upon propositions presented to it by the executive power. It may also remain inactive, as was often the case with the ancient States-General of France, because there are preliminaries upon which it is not agreed, questions of etiquette or precedence, disputes concerning priority in the objects to be discussed, &c.

2. *Useless decision.* — This is an evil, not only on account of the loss of time, but also because every useless decision, by augmenting the mass of the laws, renders the whole more obscure, and more difficult to be retained and comprehended.

3. *Indecision.*† — Is the measure proposed a bad one? Indecision is not only an evil from the time lost, but it allows a state of dread to subsist in the public mind — the dread lest this measure should at last be adopted.

Is the measure proposed a good one? The evil which it would have caused to cease is prolonged, and the enjoyment of the good it would produce is retarded, so long as the indecision subsists.

4. *Delays.* — This head may sometimes be confounded with the preceding, but at other times it differs from it: there may be occasion of complaining of indecision when there is no delay; as if, after a single sitting, nothing is done. There may be ground for complaining of delay in cases in which a decision has been formed. In matters of legislation, indecision corresponds to denial of justice, in affairs of justice. Superfluous delays in the deliberations, correspond with useless delays in procedure.

Under the head of delays may be ranked all vague and useless procedures — preliminaries which do not tend to a decision — questions badly propounded, or presented in a bad order — personal quarrels — witty speeches, and amusements suited to the amphitheatre or the playhouse.

5. *Surprises* or *precipitations.* — Surprises consist in precipitating a decision, either by taking advantage of the absence of many of the members, or by not allowing to the assembly either the time or the means of enlightening itself. The evil of precipitation lies in the danger lest it should be a cover for a surprise, or should give a suspicious character to a decision otherwise salutary.

6. *Fluctuation in measures.* — This inconvenience might be referred to the head of delays and lost time; but the evil which results is much greater. Fluctuations tend to diminish the confidence in the wisdom of the assembly, and in the duration of the measures it adopts.

7. *Quarrels.* — The time lost in these is the

* See also the Synoptical Table, page 304, in which these heads of inconvenience are differently arranged.

† I understand by this, the being in a state of irresolution in relation to questions upon which it is desirable to take one side.

least evil. Animosities and personalities in political assemblies produce dispositions most opposite to the search after truth; and have even too much tendency to the formation of those violent parties which beget civil wars.

The histories of Rome and Poland furnish numerous examples. But war is an assemblage of the most destructive acts; and the evil of civil war is never less than double that of a foreign war.

But before reaching this fatal term, the animosities of political assemblies substitute objects altogether foreign from those which ought to occupy them. A thousand incidents which daily arise, lead them to neglect what ought to be attended to. All who take any share in the assembly are in a state of suffering and agitation. An excessive distrust deceives more than an extreme credulity: the most certain result is loss of honour—disgrace for one of the parties engaged in the quarrel, and often for both.

8. *Falsehoods.* — I place under this general head, all acts opposed to the most perfect truth in the procedures of a political assembly. Honesty ought to be its animating principle. This maxim will not be contested even by those who are least observant of it: but those who are most enlightened upon the public interest will the most strongly feel its justice and importance.

9. *Decisions, vicious on account of form.* — In French practice, the resolutions of the chamber are reduced into form after the sitting of the assembly. Hence the resolutions, as entered upon the journals, may err in form though not in substance; that is, they may not entirely or not clearly express the intention of the legislature. They err by *excess*, when they contain anything superfluous; they err by *defect*, when they do not express all that is necessary; they are obscure, when they present a confused mixture of ideas; they are *ambiguous*, when they offer two or more meanings, in such sort that different individuals may find in them grounds for opposing decisions.

10. *Decisions, vicious in their foundation.* — Decisions opposed to what ought to be, in order to promote the welfare of the society.

All the inconveniences before enumerated, resolve themselves into this by lines more or less direct.

When an assembly forms an improper or hurtful decision, it may be supposed that this decision incorrectly represents its wishes. If the assembly be composed as it ought to be, its wish will be conformed to the decision of public utility; and when it wanders from this, it will be from one or other of the following causes: —

1. *Absence.* — The general wish of the assembly is the wish of the majority of the total number of its members. But the greater the number of the members who have not been present at its formation, the more doubtful is it whether the wish which is announced as general be really so.

2. *Want of freedom.* — If any restraint have been exercised over the votes, they may not be conformable to the internal wishes of those who have given them.

3. *Seduction.* — If attractive means have been employed to act upon the wills of the members, it may be that the wish announced may not be conformable to their conscientious wish.

4. *Error.* — If they have not possessed the means of informing themselves—if false statements have been presented to them — their understandings may be deceived, and the wish which has been expressed, may not be that which they would have formed had they been better informed.

Such, then, are the inconveniences to which a political assembly may be exposed from the commencement to the termination of its labours; and its system of tactics will the more nearly approach perfection, the more completely it tends to prevent them, or to minimize or reduce them to their lowest term.

Every article of its rules ought therefore to have for its object the obviating either one or more of these inconveniences. But beside the particular advantage which ought to result from each rule taken separately, a good system of tactics will present a general advantage, which depends upon it as a whole. The more nearly it approaches perfection, the more completely will it facilitate to all the co-operators the exercise of their intelligence and the enjoyment of their liberty.

It is by this means that they will accomplish all that is in their power: instead of embarrassing each other by their number, they will yield mutual assistance; they will be able to act without confusion; and they will advance with a regular progression towards a determinate object.

Every cause of disorder is a source of profit to undue influence, and prepares, in the long run, for the approach of tyranny or anarchy. Are its forms vicious? The assembly is cramped in its action, always either too slow or too rapid; lingering among preliminaries, precipitate in reaching results. It will become necessary that one portion of its members submit to exist in a state of nullity, and renounce the independence of their opinions. From that time, strictly speaking, it is no longer a political body; — all its deliberations will be prepared in secret by a small number of individuals, who will become so much the more dangerous, because acting in the name of the assembly they will have no responsibility to fear

TABULA ATAXIOLOGICA:

OR

SYNOPTICAL TABLE,

GIVING AN

Analytical Sketch of the several Heads of INCONVENIENCE corresponding to the several ENDS proper to be kept in view in framing a System of TACTICS for the Use of a POLITICAL ASSEMBLY.

The ENDS proper to be kept in view in framing a System of Tactics for the use of a Political Assembly, correspond to the several INCONVENIENCES to which the Proceedings of such Assemblies are liable to give birth: which are

- incident to the business of the Assembly; being
  - of the 1st order; (1) and those
    - of a positive nature: consisting in the existence of some improper decision: — the impropriety being considered with reference to
      - the substance; and being
        1. Absolute.
        2. Comparative. (3)
        3. Negative. (4)
        4. Presumptive, through absence of members.
        5. ——— through want of information.
        6. ——— through want of liberty. (5)
        7. In the way of falsehood. (6)
      - the words (7), and existing
        8. In the way of defect. (8)
        9. ——— excess.
        10. ——— excess and defect together.
        11. By reason of ambiguity
        12. ——— obscurity.
    - of a negative nature, consisting in the want of some proper decision, through
      - 13. Total inaction. (9)
      - 14. Delay and procrastination.
      - 15. Indecision. (10)
      - 16. Action without an object. (11)
- collateral to the business of the Assembly: — consisting in impropriety
  - of the 2d order: (2) consisting in impropriety
    - 17. Resulting, or presumable, from precipitation.
    - 18. ——— surprise.
    - 19. ——— fluctuation. (12)
  - 20. Of behaviour (13) on the part of individual members.
  - 21. ——— individuals at large.

(1) [*Of the* 1*st order*,] viz. Inconveniences which are so in themselves.

(2) [*Of the* 2*d order*,] viz. Inconveniences which are so, only in virtue of their tendency to give birth to some inconvenience or inconveniences of the 1st order.

(3) [*Comparative*,] viz. The decision in question being compared with some other, the formation of which has been prevented by it.

(4) [*Negative*,] viz. The decision being of no use.

(5) [*Want of liberty.*] Want of liberty may here be considered as capable of resulting not only from physical force or fear, but from the action of any principle of seduction of the alluring class; bribery, for instance.

(6) [*Falsehood.*] viz. Where, along with, or instead of, some *declaration of will*, which is the proper and principal business of a political assembly, the decision in question is such as conveys some *false allegation* relative to a matter of fact.

(7) [*The words.*] In all motions in *amendment*, the decision originally proposed is considered as chargeable with impropriety in this point of view.

(8) [*Defect*,] viz. By reason of the want of certain words.

(9) [*Inaction*,] viz. Not meeting: or meeting without motion or debate.

(10) [*Indecision*,] viz. Motion or debate without decision.

(11) [*Action without an object.*] Instance: debate or conversation, without motion previous or consequential.

(12) [*Fluctuation*,] *i. e.* The successive formation of *opposite* decisions: of which (circumstances remaining unaltered) one or more must accordingly have been *improper*.

(13) [*Impropriety of behaviour.*] For the several possible varieties of improper behaviour, see the Analysis of the several possible modifications of *Delinquency*, given in "The Principles of Morals and Legislation," vol. I. p. 96, Ch. XVIII.

[*Division of offences.*] Any instance of such misbehaviour, in as far as its tendency is to give birth to *absence of members*, *want of information*, *want of liberty*, *inaction*, *delay*, *indecision*, *precipitation*, *surprise*, *or fluctuation*, may be regarded in this respect as an inconvenience of the *third* order. For those inconveniences, considered in themselves, are but inconveniences of the second order. Of all the inconveniences to which the nature of such an assembly is capable of giving birth (those excepted which are merely collateral to the business of it,) the only radical ones are, the formation of some bad decision, or the non-formation of some good one. Suppose all the requisite good decisions formed, and no bad ones, all the other incidents marked as attended with inconvenience would either cease to exist, or cease to be attended with that effect.

Most of the above causes of inconvenience possess, over and above their particular tendencies, a sort of common tendency to produce an inconvenience of a more remote and general nature; viz. the bringing a degree of *discredit* on the proceedings and general character of the assembly. Acts of this tendency may be considered as so many *offences against the reputation* of the assembly. *Want of liberty*, decisions chargeable with *falsehood*, and frequent *misbehaviour* on the part of the members, may be particularly noted in this view. What life is to an individual, reputation is to a political assembly. An offence against the reputation of such an assembly, committed by the assembly itself, is a sort of approach to suicide.

N.B.—This Table may be made to serve as a *Test* of the propriety of all manner of Rules and other Institutions, proposed or proposable for the regulation of proceedings in a Political Assembly. Every legitimate reason, given in operating in *favour* of any such rule or institution, consists in the allegation of its tendency to *prevent* the taking place of some one or more of the inconveniences therein exhibited. Every legitimate reason, given as operating in *disfavour* of any such rule or institution, consists in the allegation of its tendency to *give birth* to some one or more of those inconveniences.

§ 3. *Of Political Bodies in general.*

The figurative expression of a body-politic has produced a great number of false and extravagant ideas. An analogy, founded solely on this metaphor, has furnished a foundation for pretended arguments, and poetry has invaded the dominion of reason.

An assembly or collection of individuals, inasmuch as they are found united together, in order to perform a common act, forms what may in certain respects be called a *body*.

But a body does not necessarily imply an assembly, since many individuals may declare their concurrence in the same act without having assembled; for example, by signing the same writing. Nothing is more common in England, than *petitions* to parliament, by hundreds and thousands of individuals, who have separately signed them, without having formed any assembly.

A certain body has a permanent existence; a certain other may have only an occasional, or, so to speak, an ephemeral existence (as an English jury.)

A certain body may have an unlimited extent as to number; a certain other may be be circumscribed within a fixed number.

A certain body may be privileged; a certain other, not: a privileged body is one of which the members, acting together under certain regulations, have received certain rights which the other citizens do not possess.

By *bodies-politic*, we generally understand privileged bodies, which have, under this name, an existence more or less permanent; they are often perpetual, and of a limited number.

A certain body is simple, another is compound. The British Parliament is a compound body, which is formed of two distinct assemblies, and of the supreme head of the State.

It may be easily conceived, that from the rest of a great body already formed, it is possible momentarily to detach a less numerous body: this is what is called a *committee*.

That which constitutes a political body, is the concurrence of many members in the same act. It is therefore clear, that the act of an assembly can only be a declarative act — an act announcing an *opinion* or a *will*.

Every act of an assembly must begin by being that of a single individual: but every declarative act, the expression of an opinion or of a will, beginning by being that of an individual, may finish by being that of a body. "This," says Titius, "is what passes in my mind." "This is precisely what has passed in mine," may Sempronious equally say

It is, therefore, the power of agreeing in the same intellectual act which constitutes the principle of unity in a body.*

§ 4. *Of Permanent Bodies.*

A permanent political body is a collection of individuals designed to produce a train of actions relative to the object of their institution. These actions will be those of all, if they are unanimous; but as it is impossible that there should exist a perfect and constant identity of sentiment in a great assembly of individuals, it is generally the practice to give the same force to the act of the majority as to that of the total number.

The impossibility of an universal and constant concurrence of sentiments in an assembly, is demonstrated by the experience of all times and places. A government, in which the legislative body should be subject to the law of unanimity, is an extravagance so palpable, that without the example of Poland it would scarcely have been possible to believe that it had ever entered into the human mind; whilst the example of Poland equally shows, that if such a law were made, it could not be observed, and that in the case in which it should be observed, it would only produce the most frightful anarchy.

When we consider the decision of a political body, what appears desirable in the first place, is to obtain the unanimous wish of its members: what is desirable in the second place, is the will which most nearly approaches it. This leads us to be contented with the will of the simple majority; since, how far soever this may be from the really universal will, it is nearer to it than the contrary will.

Are the numbers found equal on each side? there results from it no general act — one will destroying the other; no conclusion is arrived at — things will remain as they were, unless there be a necessity for giving a predominant voice to some person.

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* It is in reality only an intellectual act which can be identical among many individuals, and constitute the principle of unity in a body. It cannot be a physical act: such an act, peculiar to the individual who exercises it, does not offer any foundation for this identity. When the Roman senate decided that the consul Opimius should put Tiberius Gracchus to death, this decision was literally, and without figure, the act of each senator who contributed to it by his vote. When Opimius in consequence slew Gracchus with his sword, the blow struck was the act of Opimius alone. Jurists say that this act was no less the act of the senate than the other. *Qui facit per alium, facit per se.* I am not examining whether this mode of expression, which tends to confound one person with another, may have any use; all that I intend to observe here is, that if, for the sake of abbreviation, or for greater emphasis, this stroke of the sword be represented as the act of the senate, it can only be so in a figurative sense.

I have not as yet spoken of the case of absence, which continually changes the identity of the assembly. What shall be said of a will which is not declared? It does not belong either to one side or the other. It cannot be counted in the composition of the general will.

To annul the will of the assembly on account of absentees, would be to give to the wills of the absentees the same effect as if they had been declared for the party of the minority, which by the supposition has not been done. In the calculation of suffrages, the true value of an absent will, to speak mathematically, is *one less one;* that is, equal to zero. To give to it the value of *plus one*, or *minus one*, would be equally a false calculation.

But is it always necessary to have a decision? No; without doubt: there are many cases in which it would be too dangerous to permit a small portion of the assembly to act alone. It is better not to have any decision, than to have one which does not unite a certain proportion of the suffrages of the whole body. The number necessary for rendering any act of the assembly legal, should be fixed beforehand. This important question is only mentioned here — it will be discussed separately hereafter.

It is enough to remark here, that the ordinary formula — *such has been the decision of the assembly* — announces some very different facts. With an assembly of which the numerical composition continually varies, the only identity which exists is the legal effect of its decisions.

This is too metaphysical, it may be said: but it may be replied, it is necessary, since it is wished to explain the nature of a political body, without having recourse to figurative language. This expression has served as a pretext for allegories without end, which themselves have become the foundation of a multitude of puerile reasonings.

The imaginations of writers have been stretched to give to political bodies the properties of different kinds of bodies. Sometimes they are mechanical bodies; and then it is a question of levers and springs — of wheelwork — of shocks — of friction — of balancing — of preponderance.

Sometimes they are animated bodies; — and then they have borrowed all the language of physiology: — they speak of health — of sickness — of vigour — of imbecility — of corrupton — of dissolution — of sleep — of death and resurrection. I cannot tell how many political works would be annihilated, if this poetical jargon were abstracted from them, with which their authors have thought to create ideas, when they have only combined words.

It is true, that for purposes of abbreviation, it is lawful to borrow certain traits of figurative language, and that one is even obliged so to do; since intellectual ideas can only be expressed by sensible images. But in this case there are two precautions to be observed: the one, never to lose sight of simple and rigorous truth — that is to say, to be always ready mentally to translate the figurative into simple language; the other not to found any conclusion upon a figurative expression, so far as it has anything incorrect in it — that is to say, when it does not agree with the real facts.

Figurative language is very useful for facilitating conception, when it follows in the train of simple language: it is mischievous when it occupies its place. It accustoms us to reason upon the most false analogies, and gathers round the truth, a mist which the most enlightened minds are scarcely able to penetrate.

§ 5. *Division of the Legislative Body into two assemblies.*

Is it desirable to have two assemblies, whose agreement should be rendered necessary to the authority of a law?

There are reasons on both sides: let us review them.

The division of the legislative body appears subject to the following inconveniences: —

1. It will often have the effect of giving to the minority the effect of the majority. The unanimity even of one of the two assemblies would be defeated by a majority of a single vote in the other assembly.

2. This arrangement is calculated to favour two different intentions, according to the quality of the members thus distributed. If it be founded upon orders — for example, peers and commoners — the result is to favour an undue preponderance — to set the interests of a particular class in opposition to the interests of the nation itself. If there are two rival assemblies without distinctions, — the result is to favour corruption; since if a majority can be secured in the one, it is enough: the other may be neglected.

3. Each assembly would be deprived of a part of the knowledge it would have possessed in a state of union. The same reasons are not presented in the two houses with the same force. The arguments which have decided the votes in the one may not be employed in the other. The proposer of the motion, who has made the subject a profound study, will not be present in the assembly in which objections are made against it. The cause is judged without hearing the principal party.*

* This inconvenience will be lessened if the deliberations are public and successive. The reasons which have prevailed in one assembly will be known in the other.

4. This division necessarily produces useless delays. Two assemblies cannot be engaged at the same time upon the same matter — at least in all those cases in which there are original documents to be presented, or witnesses to be heard. Hence double labour — double delay.

Such assemblies cannot exist without opposite pretensions. There will arise questions of competency, which will lead to negotiations, and often to ruptures. These disputes concerning powers or prerogatives, beside their own inconveniences, beside the loss of time they occasion, will often furnish the means of striking both assemblies with immovability. This continually happened in the ancient States-General of France. The court encouraged disunion between the different orders; it combated the one by the other, and always found in this discord a plausible pretext for dismissing them.

5. The final result of this division is to produce a distribution of powers, which gives to one of the assemblies the *initiative*, and reduces the other to a simple *negative* — a natural and fruitful source of undue opposition, of quarrels, of inaction, and of perpetuity for abuse.

Everything tends to produce a repartition of this nature. Two independent assemblies cannot long exist without measuring their strength. Besides, those who have the principal conduct of affairs cannot act without laying down a plan, and without securing the means of its execution. They must choose one of the assemblies in order to begin their operations there; if one appear to have more influence than the other, they will carry all important propositions thither. This alone would be sufficient entirely to destroy the balance. Thus would be established, not by right, but in fact, a distinction between the two powers, the one being endowed with the initiative, and the other with a simple negative.

But in reference to personal interest — the only motive upon which we can constantly reckon — that body which is reduced to a single negative, will be opposed to everything. It can only show its power by rejecting: it appears as nothing when it accepts. To play the first part, is to govern; — to play the second, is to be governed.

Deprived of the motives of honour, this negative body will detach itself insensibly from the habits of business: business will be considered an ungrateful task. This body will reserve to itself the easiest part, that of opposing everything, except in those cases in which it fears to compromise itself with public opinion, and to lose its reputation by an odious resistance.

The following are the reasons which may be alleged in favour of this division: —*

[First advantage, *Maturity of discussion.*

This division is a certain method of preventing precipitation and surprise.

It is true, that in a single assembly, rules may be established which prescribe multiplied examinations, according to the importance of the business; and it is thus that we find in the House of Commons *three readings*, three discussions, at different intervals; — discussion in committee, article by article; report of the committee; examination of this report: petitions from all who are interested; appointment of a day for considering these petitions. It is by these general precautions, and others like them, that the danger of surprise is obviated, and maturity of deliberation secured.

This is true: but a single assembly may have the best rules, and disregard them when it pleases. Experience proves that it is easy to lay them aside; and urgency of circumstances always furnishes a ready pretext, and a popular pretext, for doing what the dominant party desires. If there are two assemblies, the forms will be observed; because if one violate them, it affords a legitimate reason to the other for rejection of everything presented to it after such suspicious innovation.

Besides, multiplied discussions in a single assembly do not present the same security as those which take place among different bodies. Diversity of interests, of views, of prejudices and habits, are absolutely necessary for the examination of objects under all their relations. Men who act long together contract the same connexions and modes of thinking, a spirit of routine and of party, which has its natural correction in another association.

A second assembly may therefore be considered as a tribunal of appeal from the judgment of the first.

Second advantage, *Restriction of the power of a single assembly.*

An assembly of deputies elected by the people, and removable, would from this cause be in a state of dependence, which would oblige them to consult the wishes of their constituents: but until a system of absolutely free election and removability is established, supposing such a system easy of establishment, and without inconvenience, it is no less true that a legislative assembly is only responsible to public opinion, from which a very imperfect security results against the abuse of power. If there be two assemblies differently constituted, the one naturally serves as a restraint to the other; the power of the demagogue will be weakened; the same individual will scarcely be able to exercise the same influence in both assemblies. There will arise an emulation of credit and talents. Even the jealousy of one assembly would become in this case a safeguard against the usurpations of the other, and the constitution would be

* Mr. Bentham not having executed this labour, I have endeavoured to supply it.—*Dumont.*

preserved by passions which operate in different directions.

Third advantage, *Separation of the nobility and the people.* If there be in a state certain powerful and privileged bodies, such as the nobility and clergy, it is better to give to their deputies a separate assembly, than to confound them with those of the people in one house. Why? In the *first* place, lest if their number were not determined, they should obtain, from the influence of their rank and fortune, a considerable preponderance in the elections.

2*dly*, If they act separately, the whole responsibility of opinion will rest upon their own heads: they cannot be ignorant that the public will explain their conduct by reference to their personal interests, and that the refusal of a popular law will expose them to the severity of the judgment of the whole nation. If they are confounded with the deputies of the people in one assembly, they will possess means of influence which will act secretly, and their peculiar votes will be hidden in the general vote.

3*dly*, If in a great state you have only a single assembly, it will be too numerous to act well, or it will be necessary to give to the people only such a number of deputies as will be insufficient to establish public confidence.

Of the five objections which have been presented against the division of the legislative power, the fifth is doubtless the strongest. One of the two assemblies will obtain the preponderance — it will have the initiation. There remains nothing for the other, in the majority of cases, but the negative. It appears sufficiently absurd to create a body of senators, or of nobles solely for the purpose of opposing the wishes of the deputies of the people. But in this manner of representing the matter, it is considered only in respect of its abuse, and there is a double departure from truth, in trusting more to an assembly called representative than ought to be trusted, and fearing more from an assembly of nobles than ought to be feared.*

It cannot be denied, that at all times the division of the legislative body, whatever may be the composition of the two houses, presents great obstacles to the reform of abuses. Such a system is less proper for creating than preserving. This shows that it is suitable to an established constitution. The vessel of the state, secured by these two anchors, possesses a power of resistance against the tempests, which could not be obtained by any other means.

But if the division of the legislative bodies, be extended to three or four assemblies, it will be seen to give birth to a complication of irremediable inconveniences: — not only are the delays, the rivalries, the obstacles to every species of improvement, multiplied, but a means is also given to the executive of stopping everything, by a superior influence over a single assembly, or of annihilating the power of one of these assemblies, if the concurrence of two others decides everything. There results from such a division, an illegal and fraudulent association, in which two of the associates have only to agree together, in order to leave the third only the semblance of power. It is thus that the nobility and clergy in Denmark held the commons in a condition of nearly absolute nullity; and it was thus also, that by a union between the commons and the clergy against the nobility, the States were destroyed, and absolute power bestowed on the King. Sicily also had its parliament, in which the two superior orders having always agreed among themselves against the third estate, have reduced it to an existence purely nominal.

Returning to the question of two assemblies: if it were asked what good has resulted in England from the House of Lords, it would not be easy to cite examples of bad laws which it has prevented by its negative; it is possible, on the contrary, by citing many good ones which it had rejected, to conclude that it was more hurtful than useful. But this conclusion would not be just; for in examining the effects of an institution, we ought to take account of what it does, without being perceived, by the simple faculty of hindering. An individual is not tempted to ask for what he is certain beforehand will be refused. No one undertakes an enterprise which is certain not to succeed. A constitution becomes stable, because there is a power established for its protection. If there were no positive proof of good which the House of Lords has done, we may in part attribute to it the moderation with which the House of Commons has used its power, the respect which it shows for the limits of its slightly determined authority, and its constant subjection to the rules which it prescribes to itself.

I shall confine myself to a simple enumeration of several collateral advantages resulting from a superior chamber; such as the relief

* To the reasons already given, for thinking that the nobility when united in one chamber are less to be feared than is commonly thought, it would be proper to add another, which is drawn from their character.

The nobility are naturally indolent; they dislike business, because, they are unaccustomed to it. Even in England, the House of Lords is extremely negligent of its senatorial functions. It is frequently necessary to recruit it, to maintain it in activity. They are like certain Indians, who allow themselves to be governed by men brought from another climate.

Those who have most to lose are in consequence most timid. Their rank makes them most prominent. They cannot escape in the crowd. If they render themselves unpopular, this unpopularity follows them everywhere.

which it gives to the government in the eyes of the people; the greater force conferred on the laws, when the nobility have concurred in sanctioning them; the emulation which diversity of ranks spreads among the different classes of society; the advantage of presenting a fixed and precise career to ambition, in which a legitimate reward is worth more than the demagogue could promise himself from success; and the still greater advantage of retaining the nobility within certain limits, of rendering it hereditary only in the eldest son, and of connecting its interest with the general interest, by a continual transfusion of these noble families among the body of the nation. There is no ducal house in England which has not in its bosom a part more attached by interest to the liberty of the commons, than to the prerogatives of the peerage. This is the principle of stability. Each one in this beautiful political order, is more afraid of losing what he possesses, than desirous of what he has not.]

CHAPTER II.

OF PUBLICITY.

Before entering into the detail of the operations of the assembly, let us place at the head of its regulations the fittest law for securing the public confidence, and causing it constantly to advance towards the end of its institution.

This law is that of *publicity*. The discussion of this subject may be divided into six parts:—1. Reasons for publicity; 2. Examination of objections to publicity; 3. Exceptions to be made; 4. The points to which publicity should extend; 5. The means of publicity; 6. Observations on the practice established in England.

§ 1. *Reasons for Publicity.*

1. To constrain the members of the assembly to perform their duty.

The greater the number of temptations to which the exercise of political power is exposed, the more necessary is it to give to those who possess it, the most powerful reasons for resisting them. But there is no reason more constant and more universal than the superintendence of the public. The public compose a tribunal, which is more powerful than all the other tribunals together. An individual may pretend to disregard its decrees — to represent them as formed of fluctuating and opposite opinions, which destroy one another; but every one feels, that though this tribunal may err, it is incorruptible; that it continually tends to become enlightened; that it unites all the wisdom and all the justice of the nation; that it always decides the destiny of public men; and that the punishments which it pronounces are inevitable. Those who complain of its judgments, only appeal to itself; and the man of virtue, in resisting the opinion of to-day—in rising above general clamour, counts and weighs in secret the suffrages of those who resemble himself.

If it were possible to abstract one's self from this tribunal, who would wish so to do? It without doubt would be neither the good nor the wise man, since in the long run these have nothing to fear, but everything to hope. The enemies of publicity may be collected into three classes: the malefactor, who seeks to escape the notice of the judge; the tyrant, who seeks to stifle public opinion, whilst he fears to hear its voice; the timid or indolent man, who complains of the general incapacity in order to screen his own.

It may perhaps be said, that an assembly, especially if numerous, forms an internal public, which serves as a restraint upon itself. I reply, that an assembly, how numerous soever, will never be sufficiently large to supply the place of the true public. It will be most frequently divided into two parties, which will not possess, in reference one to another, the qualities necessary for properly exercising the function of judges. They will not be impartial. Whatever the conduct of an individual may be, he will almost always be secure of the suffrages of one party, in opposition to the other. The internal censure will not be sufficient to secure probity, without the assistance of external censure. The reproaches of friends will be little dreaded, and the individual will become insensible to those of his enemies. The spirit of party shut up within narrow limits, equally strips both praise and blame of its nature.

2. To secure the confidence of the people, and their assent to the measures of the legislature: —

Suspicion always attaches to mystery. It thinks it sees a crime where it beholds an affectation of secresy; and it is rarely deceived. For why should we hide ourselves if we do not dread being seen? In proportion as it is desirable for improbity to shroud itself in darkness, in the same proportion is it desirable for innocence to walk in open day, for fear of being mistaken for her adversary. So clear a truth presents itself at once to the minds of the people, and if good sense had not suggested it, malignity would have sufficed to promulgate it. The best project prepared in darkness, would excite more alarm than the worst, undertaken under the auspices of publicity.

But in an open and free policy, what confidence and security — I do not say for the people, but for the governors themselves! Let it be impossible that any thing should be done which is unknown to the nation — prove to it that you neither intend to deceive

nor to surprise—you take away all the weapons of discontent. The public will repay with usury the confidence you repose in it. Calumny will lose its force; it collects its venom in the caverns of obscurity, but it is destroyed by the light of day.

That a secret policy saves itself from some inconveniences I will not deny; but I believe, that in the long run it creates more than it avoids; and that of two governments, one of which should be conducted secretly and the other openly, the latter would possess a strength, a hardihood, and a reputation which would render it superior to all the dissimulations of the other.

Consider, in particular, how much public deliberations respecting the laws, the measures, the taxes, the conduct of official persons, ought to operate upon the general spirit of a nation in favour of its government. Objections have been refuted, — false reports confounded; the necessity for the sacrifices required of the people have been clearly proved. Opposition, with all its efforts, far from having been injurious to authority, will have essentially assisted it. It is in this sense that it has been well said, *that he who resists, strengthens:* for the government is much more assured of the general success of a measure, and of the public approbation, after it has been discussed by two parties, whilst the whole nation has been spectators.

Among a people who have been long accustomed to public assemblies, the general feeling will be raised to a higher tone—sound opinions will be more common—hurtful prejudices, publicly combated, not by rhetoricians but by statesmen, will have less dominion. The multitude will be more secure from the tricks of demagogues, and the cheats of impostors; they will most highly esteem great talents, and the frivolities of wit will be reduced to their just value. A habit of reasoning and discussion will penetrate all classes of society. The passions, accustomed to a public struggle, will learn reciprocally to restrain themselves; they will lose that morbid sensibility, which among nations without liberty and without experience, renders them the sport of every alarm and every suspicion. Even in circumstances when discontent most strikingly exhibits itself, the signs of uneasiness will not be signs of revolt; the nation will rely upon those trustworthy individuals whom long use has taught them to know; and legal opposition to every unpopular measure, will prevent even the idea of illegal resistance. Even if the public wish be opposed by too powerful a party, it will know that the cause is not decided without appeal: hence persevering patience becomes one of the virtues of a free country.

The order which reigns in the discussion of a political assembly, will form by imitation the national spirit. This order will be reproduced in clubs and inferior assemblies, in which the people will be pleased to find the regularity of which they had formed the idea from the greater model. How often, in London, amid the effervescence of a tumult, have not well-known orators obtained the same attention as if they had been in parliament? The crowd has ranged itself around them, has listened in silence, and acted with a degree of moderation which could not be conceived possible even in despotic states, in which the populace, arrogant and timid alternately, is equally contemptible in its transports and its subjection. Still, however, the régime of publicity — very imperfect as yet, and newly tolerated, — without being established by law, has not had time to produce all the good effects to which it will give birth. Hence have arisen riots, for which there was no other cause than the precipitation with which the government acted, without taking the precaution to enlighten the people.*

3. To enable the governors to know the wishes of the governed.

In the same proportion as it is desirable for the governed to know the conduct of their governors, is it also important for the governors to know the real wishes of the governed. Under the guidance of publicity, nothing is more easy. The public is placed in a situation to form an enlightened opinion, and the course of that opinion is easily marked. Under the contrary régime, what is it possible to know with certainty? The public will always proceed, speaking and judging of everything; but it judges without information, and even upon false information: its opinion, not being founded upon facts, is altogether different from what it ought to be, from what it would be, if it were founded in truth. It ought not to be believed that government can dissipate at pleasure, those errors which it would have been easy to prevent. Late illumination does not always repair the evil of a previously erroneous impression. Have the people, from the little which has transpired respecting a project, conceived sinister apprehensions? We will suppose them unfounded; but this does not alter the case. they become agitated; they murmur; alarm is propagated; resistance is prepared. Has the government nothing to do but to speak—to make known the truth, in order to change the current of the public mind? No; without doubt: confidence is of slow growth. The odious imputations exist; the explanations which are given of necessity, are considered as the acknowledgements of weakness. Hence improvement itself produces a shock, when improperly introduced,

* For example, the riots in London in 1780.

and when it is opposed to the inclinations of the people. The history of the Emperor Joseph II. would furnish a multitude of examples.

To these major considerations may be joined others, which ought not to be neglected.

4. In an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge.

For what purpose renew the assembly, if the people are always obliged to choose from among men of whom they know nothing?

To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, "You are to elect or reject such or such of your deputies without knowing why — you are forbidden the use of reason — you are to be guided in the exercise of your greatest powers only by hazard or caprice."

5. Another reason in favour of publicity: — To provide the assembly with the means of profiting by the information of the public.

A nation too numerous to act for itself, is doubtless obliged to entrust its powers to its deputies. But will they possess in concentration all the national intelligence? Is it even possible that the elected shall be in every respect the most enlightened, the most capable, the wisest persons in the nation? — that they will possess, among themselves alone, all the general and local knowledge which the function of governing requires? This prodigy of election is a chimera. In peaceful times, wealth and distinguished rank will be always the most likely circumstances to conciliate the greatest number of votes. The men whose condition in life leads them to cultivate their minds, have rarely the opportunity of entering into the career of politics. Locke, Newton, Hume, Adam Smith, and many other men of genius, never had a seat in parliament. The most useful plans have often been derived from private individuals. The establishment of the sinking fund by Mr. Pitt, it is well known, was the fruit of the calculations of Dr. Price, who would never have had the leisure requisite for such researches, if his mind had been distracted by political occupations. The only public man, who from the beginning of the quarrel with the American colonies had correct ideas upon the subject, and who would have saved the nation from war if he had been listened to, was a clergyman, excluded by this circumstance from the national representation.* But without entering into these details, it may easily be conceived how effective publicity is, as a means of collecting all the information in a nation, and consequently for giving birth to useful suggestions.

6. It may be thought descending from the serious consideration of this subject, to reckon among the advantages of publicity, *the amusement which results from it.* I say amusement by itself, separate from instruction, though it be, in fact, not possible to separate them.

But those who regard this consideration as frivolous, do not reason well. What they reckon *useful*, is what promises an advantage: amusement is an advantage already realized; and this kind of pleasure in particular, appears to me sufficient by itself to increase the happiness of any nation, which would enjoy much more than those nations who know it not.

Memoirs are one of the most agreeable parts of French literature, and there are few books which are more profound: but memoirs do not appear till long after the events which they record have happened, and they are not in the hands of every one. English newspapers are memoirs, published at the moment when the events occur; in which are found all the parliamentary discussions—everything which relates to the actors on the political theatre; in which all the facts are freely exhibited, and all opinions are freely debated. One of the Roman emperors proposed a reward for the individual who should invent a new pleasure: no one has more richly deserved it, than the individual who first laid the transactions of a legislative assembly before the eyes of the public. †

§ 2. *Objections to Publicity.*

If publicity be favourable in so many respects to the governors themselves — so proper for securing them against the injustice of the public, for procuring for them the sweetest reward of their labours — why are they so generally enemies of this régime? Must it be sought in their vices? in the desire of the governors to act without responsibility — to withdraw their conduct from inspection — to impose upon the people — to keep them in subjection by their ignorance? Such motives may actuate some among them; but to attribute them to all, would be the language of satire. There may be unintentional errors in this respect, founded upon specious objections: let us endeavour to reduce them to their just value.

First objection — "The public is an incompetent judge of the proceedings of a political assembly, in consequence of the ignorance and passions of the majority of those who compose it."

If I should concede, that in the mass of the public there may not be one individual in a hundred who is capable of forming an enlightened judgment upon the questions which

* Dean Tucker.

† See Paley's Moral Philosophy, b. vi. ch. 6, in which this subject is treated in a manner to which there is nothing to add.

are discussed in a political assembly, I shall not be accused of weakening the objection; and yet, even at this point, it would not appear to me to have any force against publicity.

This objection would have some solidity, if, when the means of judging correctly were taken from the popular tribunal, the inclination to judge could be equally taken away: but the public do judge and will always judge. If it should refrain from judging, for fear of judging incorrectly, far from deserving to be charged with ignorance, its wisdom would deserve to be admired. A nation which could supend its judgment, would not be composed of common men, but of philosophers.

But the increase of publications, it will be said, will increase the number of bad judges in a much greater proportion than the good ones.

To this it may be replied, — that for this purpose it is necessary to distinguish the public into three classes: The first is composed of the most numerous party, who occupy themselves very little with public affairs — who have not time to read, nor leisure for reasoning. The second is composed of those who form a kind of judgment, but it is borrowed — a judgment founded upon the assertions of others, the parties neither taking the pains necessary, nor being able, to form an opinion of their own. The third is composed of those who judge for themselves, according to the information, whether more or less exact, which they are able to procure.

Which of these three classes of men would be injured by publicity?

It would not be the first; since, by the supposition, it would not affect them. It is only the third: these judged before—they will still judge; but they judged ill upon imperfect information; they will judge better when they are in possession of the true documents.

Whilst in respect of the second class, we have said that their judgments are borrowed, they must therefore be the echo of those of the third class. But this class being better informed, and judging better, will furnish more correct opinions for those who receive them ready made. By rectifying these, you will have rectified the others; by purifying the fountain, you will purify the streams.

In order to decide whether publicity will be injurious or beneficial, it is only necessary to consider the class which judges; because it is this alone which directs opinion. But if this class judge ill, it is because it is ignorant of the facts — because it does not possess the necessary particulars for forming a good judgment. This, then, is the reasoning of the partisans of mystery: — "You are incapable of judging, because you are ignorant; and you shall remain ignorant, that you may be incapable of judging."

Second objection — "Publicity may expose to hatred a member of the assembly, for proceedings which deserve other treatment."

This objection resolves itself into the first, — the incapacity of the people to distinguish between its friends and its enemies.

If a member of a political assembly have not sufficient firmness to brave a momentary injustice, he is wanting in the first quality of his office. It is the characteristic of error to possess only an accidental existence, which may terminate in a moment, whilst truth is indestructible. It requires only to be exhibited, and it is to effect this that everything in the region of publicity concurs. Is injustice discovered? — hatred is changed into esteem; and he who, at the expense of the credit of to-day, has dared to draw for reputation on the future, is paid with interest.

As regards reputation, publicity is much more useful to the members of an assembly than it can be hurtful: it is their security against malignant imputations and calumnies. It is not possible to attribute to them false discourses, nor to hide the good they have done, nor to give to their conduct an unfair colouring. Have their intentions been ill understood?—a public explanation overturns the false rumours, and leaves no hold for clandestine attacks.

Third objection — "The desire of popularity may suggest dangerous propositions to the members; — the eloquence which they will cultivate will be the eloquence of seduction, rather than the eloquence of reason; — they will become tribunes of the people, rather than legislators."

This objection also resolves itself into the first,—that is, the incompetence of the people to judge of their true interests, to distinguish between their friends and their flatterers.

In a representative state, in which the people are not called upon to vote upon political measures, this danger is little to be apprehended. The speeches of the orators, which are known to them only through the newspapers, have not the influence of the passionate harangues of a seditious demagogue. They do not read them till after they have passed through a medium which cools them; and besides, they are accompanied by the opposite arguments, which, according to the supposition, would have all the natural advantage of the true over the false. The publicity of debates has ruined more demagogues than it has made. A popular favourite has only to enter parliament, and he ceases to be mischievous. Placed amid his equals or his superiors in talent, he can assert nothing which will not be combated: his exaggerations will be reduced within the limits of truth, his presumption humiliated, his desire of momentary popularity ridiculed: and the flatterer of the people will finish by disgusting the people themselves.

Fourth objection — "In a monarchy, the publicity of the proceedings of political assemblies, by exposing the members to the resentment of the head of the State, may obstruct the freedom of their decisions."

This objection, more specious than the preceding, vanishes when it is examined, and even proves an argument in favour of publicity. If such an assembly be in danger from the sovereign, it has no security except in the protection of the people. The security arising from secret deliberations is more specious than real. The proceedings of the assembly would always be known to the sovereign, whilst they would always be unknown to those who would only seek to protect it, if the means were left to them.

If, then, a political assembly prefer the secret regimé, by alleging the necessity of withdrawing itself from the inspection of the sovereign, it need not thus deceive itself: this can only be a pretence. The true motive of such conduct must rather be to subject itself to his influence, without too much expoing itself to public blame; for by excluding the public, it only frees itself from public inspection. The sovereign will not want his agents and his spies: though invisible, he will be, as it were, present in the midst of the assembly.

Is it objected against the régime of publicity, that it is a system of *distrust?* This is true; and every good political institution is founded upon this base. Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it? Consider the objects of their duties: they are not their own affairs, but the affairs of others, comparatively indifferent to them, very difficult, very complicated,—which indolence alone would lead them to neglect, and which require the most laborious application. Consider their personal interests: you will often find them in opposition to the interests confided to them. They also possess all the means of serving themselves at the expense of the public, without the possibility of being convicted of it. What remains, then, to overcome all these dangerous motives? what has created an interest of superior force? and what can this interest be, if it be not respect for public opinion—dread of its judgments—desire of glory? — in one word, everything which results from publicity?

The efficacy of this great instrument extends to everything — legislation, administration, judicature. Without publicity, no good is permanent: under the auspices of publicity, no evil can continue.

§ 3. *Objects to which publicity ought to extend.*

The publication of what passes in a political assembly ought to embrace the following points:—

1. The tenor of every motion.
2. The tenor of the speeches or the arguments for and against each motion.
3. The issue of each motion.
4. The number of the votes on each side.
5. The names of the voters.
6. The reports, &c. which have served as the foundation of the decision.

I shall not stop to prove that the knowledge of all these points is necessary for putting the tribunal of the public in a condition for forming an enlightened judgment. But an objection may be made against the publicity of the respective number of the voters. By publishing these, it may be said, the authority of the acts of the assembly will be in danger of being weakened, and the opposition will be encouraged when the majority is small.

To this it may be replied, that it is proper to distinguish between illegal and legal opposition. The first is not to be presumed; the second is not an evil.

The first, I say, is not to be presumed. The existence of a government regulated by an assembly, is founded upon an habitual disposition to conformity with the wish of the majority: constant unanimity is not expected, because it is known to be impossible; and when a party is beaten by a small majority, far from finding in this circumstance a motive for illegal resistance, it only discovers a reason for hope of future success.

If afterwards a legal opposition be established, it is no evil; for the comparative number of suffrages being the only measure of probability as to the correctness of its decisions, it follows that the legal opposition cannot be better founded than when guided by this probability. Let us suppose the case of a judicial decision; — that there have been two judgments, the one given by the smallest majority possible, the other by the greatest: would it not be more natural to provide an appeal against the first than against the second?

But the necessity of appeal in judicial matters is not nearly of the same importance as in matters of legislation. The decisions of the judges apply only to individual cases: the decisions of a legislative assembly regulate the interests of a whole nation, and have consequences which are continually renewed.

Do you expect that you will obtain greater submission by concealing from the public the different numbers of the votes? You will be mistaken. The public, reduced to conjecture, will turn this mystery against you. It will be very easily misled by false reports. A small minority may represent itself as nearly equal to the majority, and may make use of a thousand insidious arts to deceive the public as to its real force.

The American Congress, during the war of

independence, was accustomed, if I am not deceived, to represent all its resolutions as unanimous. Its enemies saw in this precaution the necessity of hiding an habitual discord. This assembly, in other respects so wise, chose rather to expose itself to this suspicion, than to allow the degrees of dissent to the measures which it took, to be known. But though this trick might succeed in this particular case, this does not prove its general utility. The Congress, secure of the confidence of its constituents, employed this stratagem with their approbation, for the purpose of disconcerting its enemies.

The names of the voters ought to be published, not only that the public may know the habitual principles of their deputies, and their assiduity in attending, but also for another reason. The quality of the votes has an influence upon opinion, as well as their number. To desire that they should all have the same value, is to desire that folly should have the same influence as wisdom, and that merit should exist without motive and without reward.

§ 4. *Exceptions to the rule of Publicity.*

Publicity ought to be suspended in those cases in which it is calculated to produce the following effects: —

1. To favour the projects of an enemy.

2. Unnecessarily to injure innocent persons.

3. To inflict too severe a punishment upon the guilty.

It is not proper to make the law of publicity absolute, because it is impossible to foresee all the circumstances in which an assembly may find itself placed. Rules are made for a state of calm and security: they cannot be formed for a state of trouble and peril. Secresy is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government.

§ 5. *Means of Publicity.*

The following are the means of publicity which may be employed, either in whole or in part, according to the nature of the assembly, and the importance of its affairs.

1. Authentic publication of the transactions of the assembly upon a complete plan, including the six points laid down in the preceding article: —

2. The employment of short-hand writers for the speeches; and in cases of examination, for the questions and answers.

3. Toleration of other non-authentic publications upon the same subject.

4. Admission of strangers to the sittings.

The employment of short-hand writers would be indispensable in those cases in which it would be desirable to have the entire tenor of the speech. But recourse need not be had to this instrument, except in discussions of sufficient importance to justify the expense. In England, in an ordinary trial, the parties are at liberty to employ them. In the solemn trial of Warren Hastings, the House of Commons on the one side, and the accused on the other, had their short-hand writers; — the House of Lords, in character of judge, had also its own.

With regard to non-authentic publications, it is necessary to tolerate them, either to prevent negligence and dishonesty on the part of the official reporters, or to prevent suspicion. An exclusive privilege would be regarded as a certificate of falsity. Besides, the authentic publication of the proceedings of the assembly could only be made with a slowness which would not give the public satisfaction, without reckoning the evil which would arise in the interval from false reports, before the authentic publication arrived to destroy them.

Non-official journals completely accomplish this object. Their success depends upon the avidity of the public, and their talent consists in satisfying it. This has in England reached such a point of celerity, that debates which have lasted till three or four o'clock in the morning, are printed and distributed in the capital before mid-day.

The admission of the public to the sittings is a very important point; but this subject requires explanations, which would not here be in their place. It will be treated separately.

The principal reason for this admission is, that it tends to inspire confidence in the reports of the journals. If the public were excluded, it would always be led to suppose that the truth was not reported, or at least that part was suppressed, and that many things passed in the assembly which it did not know. But independently of this guarantee, it is very useful for the reputation of the members of the assembly to be heard by impartial witnesses, and judged by a portion of the public which is changed every day. This presence of strangers is a powerful motive to emulation among them, at the same time that it is a salutary restraint upon the different passions to which the debates may give rise.*

§ 6. *State of things in England.*

In order to form a just idea of the state of things in England relative to publicity, it is necessary to pay attention to two very different things — the rules, and the actual practice. The following are the rules: —

1. All strangers (that is to say, all who are not members of the assembly) are prohibited from entering, under pain of *immediate impri-*

* In the Swiss cantons, no strangers are admitted to the debates in their representative councils, nor are any accounts of their proceedings published

sonment. Introduction by a member forms no exception to the prohibition, nor any ground of exemption from the punishment. This prohibition, established during the stormy times of the civil war in 1650, has been renewed seven times, under circumstances which furnish neither this excuse nor any other.*

2. Prohibition, as well of others as of the members themselves, to report anything that passes in the House, or to publish anything on the subject without the authority of the House.

This regulation, which dates from the commencement of the civil war, has been renewed thirty times, and for the last time in 1738, in an order in which passion appears carried to its greatest height. The language of the proudest despots is gentle and moderate, in comparison with that of this popular assembly.

3. Since 1722, there has been published by the House of Commons, what are called the Votes of the House; that is, a kind of history of its proceedings, meagre and dry, containing the formal proceedings, with the motions and decisions; and in cases of division, the numbers for and against, but without any notice of the debates.

Before this period, this publication only took place occasionally.

These votes, collected and republished at the end of the year, with an immense mass of public laws and private acts, form what are called the Journals of the House. These journals were formerly given to each member, but not sold to the public.†

4. Projects of laws before they are passed by parliament. These projects, called *bills*, are not printed under a general rule, but the printing is ordered upon special motion, and for the exclusive use of the members; so that no one can know what they contain, unless he obtain one of these privileged copies through a member. It is, however, of more importance that the public should be made acquainted with these, than with the votes.

How singular soever it may be thus to see the deputies of the people withdrawing themselves with so much hauteur from the observation of their constituents, the principles of a free government are as yet so little known, that there has been no general complaint against a conduct which tends to destroy all responsibility on the part of the representatives, and all influence on the part of the nation.

But since public opinion, more enlightened, has had greater ascendency, and principally since the accession of George III., though these anti-popular regulations are still the same, a contrary practice has prevailed in many particulars. It is doubtless to be regretted, that whatever improvement has taken place in England has been accomplished through a continual violation of the laws; but it is gratifying to observe that these innovations insensibly tend to the general perfection.

The House of Commons has allowed a small portion of the public to be present at its sittings — about one hundred and fifty strangers can be accommodated in a separate gallery. Unhappily, this indulgence is precarious. That the House ought to be able to exclude witnesses in the cases of which we have spoken, is conceded; but at present it is only necessary that a single member should require the observation of the standing order, which being always in force, is irresistible.

As to the contents of the debates and the names of the voters, there are numerous periodical publications which give account of them. These publications are crimes; but it is to these fortunate crimes that England is indebted for her escape from an aristocratic government resembling that of Venice.

These publications would not have obtained this degree of indulgence, if they had been more exact. At one time, if a stranger were discovered in the gallery with a pencil in his hand, a general cry was raised against him, and he was driven out without pity. But at present, connivance is more extended, and short-hand writers, employed by the editors of the public newspapers, are tolerated.‡

Among the Lords, the regulations are nearly the same, but the tone is more moderate. No admission to strangers — (order 5th April 1707.) No publication of debates allowed — (order 27th February 1698.) It was, however, among them, that in our times the plan of indulgence which at present reigns was commenced.

This House has one custom, which gives to one set of its opinions a publicity of which no example is found in the other.

I refer to *protests*. These are declarations, made by one or many members of the minority, of the reasons for their dissent from the measures adopted by the majority, and inserted in the journals. These protests are printed and circulated, in opposition to the regulations. There results from this publication a singularity which ought to lead to consideration, if consideration were within the province of routine. It is, that the only reasons presented to the public in an authentic form, are those which are opposed to the laws.

The House of Lords, in permitting a portion of the public to attend its sittings, has

* 26th Feb. 1688, 15th Nov. 1705,
21st Nov. 1689, 26th Jan. 1709,
2d April 1690, and
31st Oct. 1705, 16th March 1719.

† All the papers published by the House of Commons are now allowed to be sold (1838.)—*Ed.*

‡ They have in the present House of Commons a gallery appropriated to themselves (1838.) —*Ed.*

rendered this favour as burthensome as possible. There are no seats. The first row of spectators intercepts the view, and injures the hearing of those who are behind. Some of the more popular members have at different times proposed to give the public more accommodation; but the proposition has always been refused by the majority of their colleagues, either from considering that a painful attitude is more respectful, or from an absolute horror of all change.*

CHAPTER III.

OF THE PLACE OF MEETING AND ITS DEPENDENCIES.

§ 1. *Of the Building suitable for a numerous assembly.*

MAGNIFICENCE of architecture in a building intended for a large political assembly, would be almost always injurious with regard to its utility. The essential points to be considered are—

1. Facility of hearing for the members.
2. Facility of seeing for the president.
3. Personal convenience for the individuals;

And lastly, Fitness for the service.

If any of the seats are so distant that the voice with difficulty reaches them, attention being rendered painful, will not be long sustained. The same distance will deprive one part of the assembly of the inspection of its president, and from this cause alone may give rise to habitual disorder.

Besides, those who do not hear are obliged to decide upon a borrowed opinion. It was thus that the great popular assemblies, in the ancient republics, were necessarily subjected to the direction of two or three demagogues.

The difficulty of making themselves heard may also drive from the service the individuals of greatest ability, if the strength of their lungs be not proportioned to the space that their voice is required to fill. Demosthenes might have been obliged to give way to Stentor. The first quality required would no longer be mental superiority, but a physical advantage, which, without being incompatible with talent, does not necessarily imply it. The presumption is even on the other side, and in favour of the feeble and valetudinary individual, — inaptitude for corporeal exercises being partly the cause and partly the effect of a studious disposition.

A form nearly circular, seats rising amphitheatrically above each other — the seat of the president so placed that he may see all the assembly — a central space for the secretaries and papers — contiguous rooms for committees — a gallery for auditors — a separate box for the reporters for the public papers; — such are the most important points. I do not enter into detail respecting the salubrity of the hall and its adaptation for the service. I only add, that a hall well adapted to all these objects would have more influence than would at first be suspected, in securing the assiduity of the members, and facilitating the exercise of their functions.

§ 2. *Table of Motions.*

Reference is here made to a very simple mechanical apparatus for exhibiting to the eyes of the assembly the motion on which they are deliberating. The mere reading of a motion can only impart an imperfect and fugitive acquaintance with it. There is no other method for really presenting it to the minds of the members of an assembly, beside that of presenting it to their eyes.

A general idea of this table only will be presented here. We may suppose a gallery above the president's chair, which presents a front consisting of two frames, nine feet high

* By the French constitution of the year 1814, it was directed, that "all the deliberations of the Chamber of Peers should be secret."

I can discover no good reason for this secresy. If publicity be dangerous, it appears to me that there is least danger for the peers, who are the least exposed to the danger of popular ambition.

Non-publicity appears to me particularly disadvantageous to the peers. They require publicity as a bridle and a spur; as a bridle, because in virtue of their situation they are thought to have interests separate from the body of the people — as a spur, because their immoveability weakens the motives of emulation, and gives them an absolute independence.

I suppose that the Chamber of Peers is considered as being, or about to become, eminently monarchical, as being the bulwark of royalty against the attacks of the deputies of the people. But in this point of view, is not the secresy of their deliberations a political blunder? Public discussion is allowed to those who by the supposition are enemies of the royal authority, or at least too much inclined to democracy; and those who are considered the hereditary defenders of the king and his dominion, are shut up to secret discussion. Is not this in some manner to presume that their cause is too feeble to sustain the observation of the nation, and that to preserve the individuals from general disapprobation, it is necessary they should vote in secret?

When a proposition in the Chamber of Deputies has obtained great popular favour, is it not desirable that the arguments by which it has been opposed should be known? that the body which has rejected it should have the right of publicly justifying its refusal? that it should not be exposed to the injurious suspicion of acting only with a view to its own interest? that it ought not to be placed in so disadvantageous a position in the struggle which it has to sustain? The body which speaks in public, and whose debates are published, possesses all the means of conciliating to itself numerous partisans, whilst those who deliberate in secret can only influence themselves. It would therefore seem that this secresy, so flattering to them, had been invented as a means of taking from their influence over opinion, more than was given to them in superiority of rank.

by six feet wide, filled with black canvas, made to open like folding doors;—that this canvas is regularly pierced for the reception of letters of so large a size as to be legible in every part of the place of meeting. These letters might be attached by an iron hook, in such manner that they could not be deranged. When a motion is about to become the object of debate, it would be given to the compositors, who would transcribe it upon the table, and by closing the gallery, exhibit it like a placard to the eyes of the whole assembly.

The utility of this invention, in its most general point of view, consists in so arranging matters that no one could avoid knowing upon what motion he ought to vote.

It is true, that what is of most importance to be known, is the *sense* of a proposition, and not its *tenor*—the spirit rather than the letter. But it is only by a knowledge of the letter that we can be sure of the spirit—a mistake in only a single word may entirely change the purport of a discourse: when the words are no longer present to the memory, we are in danger of falling into mistakes—a danger which it is a folly to incur, when it may be avoided by so simple and infallible a method.

There is not a moment in the course of a debate, in which each member has not occasion to know the motion, and to be able to consult it, either for making a correct application of what he hears, or for the purpose of taking an active part in the discussion. This knowledge is of the first importance to him, whether he act as a judge, by giving his vote—or as an advocate, by speaking for or against it.

In the first place, with respect to those who listen, nothing could be more agreeable and useful to them than this table of motions. Everything which relieves the memory, facilitates the understanding—there is much less doubt about the meaning, when there is none about the words. Upon the simple enunciation or reading of a motion—all those who have been distracted—all those who readily forget—all those who are slow in understanding,—are necessarily ignorant of the subject of debate, or obliged to apply to others for information. Hence arise irregular movements, reciprocal interruptions, confusion, and noise.

In the next place, as to those who speak, the utility of this table is still more clear. If the motion be of a certain length, it requires for its recollection an effort of memory, which distracts the attention at a moment in which there is a necessity for employing it altogether in another manner. There ought not to be a necessity of seeking for words when there is already too much to do in seeking for arguments: the hesitation occasioned by such a search, disturbs the current of the thoughts.

But besides, this effort of memory is often inefficacious. Nothing is more common than to see orators, and even practised orators, falling into involuntary errors with respect to the precise terms of a motion. If this be not perceived, an incorrect judgment is the result of the error: if it be perceived, the protests against it produce either apologies or disputes, and thence loss of time in accusations and defences.

The table of motions would contribute in many respects to the perfection of the debate. We have seen that it would preserve the orators from involuntary errors: it would be no less serviceable to the assembly as a security against intentional false misrepresentations—against insidious representations, by which sentiments are imputed to an antagonist which do not belong to him. This defect of candour springs from the same principle as calumny, which hopes that some portion of the reproach with which it asperses will not be wiped away. The individual who practises this meanness is screened by the difficulty of distinguishing his false representation from involuntary error. Remove this difficulty, and the temptation to be guilty of the meanness will be removed also.

Digressions are another inconvenience in debates: they often arise from the weakness of the mind, which without intending it, loses sight of the point with which it ought to be engaged. But when the orator forgets his subject, and begins to wander, a table of motions offers the readiest means for recalling him. Under the present régime, how is this evil remedied? It is necessary for a member to rise, to interrupt the speaker, and call him to order. This is a provocation—it is a reproach—it wounds his self-love. The orator attacked, defends himself; there is no longer a debate upon the motion, but a discussion respecting the application of his arguments. The unpleasantness of these scenes, when they are not animated by the spirit of party, leads to the toleration of a multitude of digressions, experience having proved that the remedy is worse than the disease; whilst as to the president, although it be his duty to prevent these wanderings, his prudence leads him to avoid giving frequent and disagreeable admonitions, and entering into altercations which might compromise his dignity or his impartiality.

But if we suppose the table of motions placed above him, the case would be very different. He might, without interrupting the speaker, warn him by a simple gesture; and this quiet sign would not be accompanied by the danger of a personal appeal. It would be a sedative, and not a stimulant—a suggestion, and not an accusation; it would be the act, not of an adversary, but of a judge. The member would not be called upon to stop—would not be required to make a painful submission and avowal of error; he would

only have, in continuing his speech, to return to the subject of discussion; and he could not be ignorant that the sign of the president was an appeal to the assembly, the attention of which had been directed to him.

In conclusion, it may be observed that this table would give great facility in the production of good amendments. If a simple reading be sufficient for correctly seizing the spirit of a motion, it is not sufficient for giving attention to all its terms. When observations are to be made upon style, we must not trust to memory: it is desirable that the writing should be under the eye—that it may be considered in many points of view— that the microscope of attention may be applied to all its parts; and there is no other method of discovering the imperfections of detail. This kind of criticism is a peculiar talent, in which individuals are formed to excel who often do not possess any of the gifts of oratory. The profound grammarian is more useful than is generally thought to the legislator.

This table would possess a further merit, if it should only procure for the assembly the services of one clever man, who had been discouraged by a defect of memory, and retained by this defect in a state of inaction. It is well known that the two most important faculties of the mind — judgment and invention — are often very strong in those individuals who have very weak memories, especially with regard to words. With respect to talent, as well as virtue, the smaller the service required, the less the danger of its being wanting.

It may perhaps be said, that the printing of the motions before the debate, would nearly accomplish the same object, and would supply the place of this table.

But in the course of a debate, how many accidental and unforeseen motions may be made! — how many amendments which there is not time to print! It may also be observed, that a paper to be read, to be consulted, does not afford to the hearers, or the speaker, the same facility as a table which remains immovably before their eyes. It is not necessary continually to stoop for the purpose of listening or speaking, but the eye glances over the lines of the table without interruption. And besides this, the great utility of the table, the strength which its gives to the regulation against useless digressions simply by means of an admonitory sign, is an advantage not to be obtained by printing the motion.*

* I proposed this plan of Mr. Bentham's to many of the members of the Constituent Assembly of France. They considered it very ingenious, and even very useful, but that it could not be carried into effect, because of the rapidity of the motions and operations of the assembly. During many months I attended all its sittings with the greatest assiduity; and I cannot forget how often I have experienced difficulty in ascertaining what was the subject of deliberation: I have asked many members who were not able to inform me. When even the motion was known, it was only in its general object — never in all its details and in its precise terms. There were consequently continual disputes about words: a momentary absence, a momentary abstraction, a late entry, were sufficient to produce entire ignorance of the subject of debate. Individuals sought to instruct themselves by conversations, which formed the assembly into groupes, and gave rise to little particular debates. A multitude of motions thus presented passed as spectres, and were only half known. Hence the indolent members either went away without voting, or voted upon trust; that is to say, not being able to form an opinion, they abandoned themselves to that of their party.

These observations may appear but trifles, but the sum of these trifles produces great effects. A torrent is composed of drops of water, and a mountain of grains of sand.—*Note by Dumont.*

§ 3. *Description of a Table of Motions.*

The plan here pointed out may serve for a first attempt: but the easier the mode of execution, the less important are the details.

Frames. — They may be made like two folding doors. They should be filled with canvas, stretched so as to present an even surface, not sinking in the middle.

Size of the letters. — This would depend upon the size of the place of meeting; — a black ground, the letters gilt;—a strong light thrown upon the table; — the form of the letter rather oblong than square.

Method of fixing them. — The letters being made like a button, should have a hook, by means of which they might be fixed with the greatest ease. The regularity of the lines might be secured by a thread in the cloth.

Composition of the table. — The two folding leaves turn upon their hinges like a door. The compositors whilst at work are visible to the assembly (which will secure their diligence and emulation.) The two leaves closed together, will present the appearance of two pages of an open book.

Amendments. — These might be exhibited upon a separate table, placed immediately beside the others, with a reference which would direct the eye to the part of the original motion which it was wished to amend, and a word at the top of the table, which should simply indicate that the amendment is *suppressive*, *additive*, or *substitutive*.

Multiplication of tables.—There might be an assortment of tables, upon which all the known motions might be previously prepared, and thus be made to succeed each other rapidly.

Contents of the Table of Motions.

Suppose that each frame is nine feet high by six wide, and the letters one and a half

inch by three quarters of an inch, the two leaves of the table would contain more than four ordinary octavo printed pages. This may be ascertained by calculation.

At fifty-two feet distant, I have found in a church that the table of the decalogue was perfectly legible for ordinary eyes, when the letters were three quarters of an inch high.

Composition. — The labours of the compositors may perhaps be accelerated by what is called the *logographical* principle, which consists in composing not with letters, but with entire words.

By the multiplication of tables, a composition which was too long to be presented all at once to the eyes of the assembly, might be presented in parts. A project of a law, for example, whatever was its extent, might be previously prepared, and the tables shifted, without suspending the labours of the assembly.

But this plan has its limits; — that is to say, there are cases and circumstances which would prevent its being employed on account of time and space: these limits do not, however, furnish any argument against its utility upon all occasions on which it can be employed. This utility is so great — the inconveniences of the present plan are so manifest, that one might be astonished that this method had not been thought of before: but in these affairs it is not proper to be astonished at anything. Under the auspices of routine, barbarism gives law to civilization, and ignorance prevails over experience.

§ 4. *On a Table of Regulations.*

When good rules are established, it still remains to make arrangements for facilitating their execution — for making them known. A law can have no effect except as it is known.

The regulations of the assembly, reduced into the form of a table, and readable from all parts of the place of assembly, ought to be placed by the side of the president.

If they are too voluminous, the tables ought to be multiplied; but the essential points ought to be collected together in the principal table.

In every large political assembly, nothing is more frequent than an appeal to the regulations, either for attack or for defence. The contravention consumes time — the correction consumes still more. The rules are always as if they were non-existing for one part of the assembly. The new members are but little acquainted with them; and they are not always present to the minds of the most experienced veterans. Such, at least, is the state of things in the British parliament; — and it cannot be otherwise, because the regulations, far from being exposed to the eyes, only exist by tradition, and are confided only to the keeping of a treacherous memory.

A small table would not answer the end: a large table is an object of study in every moment when the attention is vacant. The least deviation becomes sensible; and hence deviations become rare; for rules are rarely transgressed when they cannot be transgressed with impunity, — when the law which condemns is before your eyes, and the tribunal which judges you at the same moment, no one will be more tempted to violate it than he would be tempted to steal red-hot iron. Procedure, which moves on other occasions with the pace of the tortoise, is in this case rapid as the lightning.

General laws, whatever may be done for their promulgation, cannot be made universally notorious. But particular laws made for one assembly may be constantly visible within it. The method is so easy, it cannot be said to be unknown. There is not a club in England which has not its regulations exhibited in its place of meeting. There is the same foresight in gaming-houses. But the bitter reflection often recurs, that the wisdom displayed in the conduct of human affairs is often in the inverse proportion of their importance. Governments have great progress to make before they will have attained, in the management of public matters, to the prudence which commonly conducts private affairs. The cause may be easily pointed out, but not the remedy.

CHAPTER IV.

OF WHAT CONCERNS THE MEMBERS PRESENT AT A LEGISLATIVE ASSEMBLY.

§ 1. *Of the utility of a Distinctive Dress for Members.*

THE establishment of a particular dress for the members during the hours of sitting, is one of those points upon which it would not be proper to wound national customs. The object, however, is not altogether so unimportant as might be thought at the first glance.

1. A particular dress serves to distinguish the members from the spectators: it may prevent the usurpation of their privilege.

2. Such a dress might attain the end of a sumptuary law, without having its rigour. This apparent equality would defend the poor man of merit from a disadvantageous comparison with the pride of fortune.

3. Such a dress tends in another manner to place the individuals upon a level, by diminishing the disadvantages of those who have to strive against any bodily defect.

4. It produces a certain impression of respect upon the spectators, and places the members themselves in a more distinguished situation — two causes which equally tend to

the maintenance of order, and the preservation of decency.

5. In the course of a debate, when parties are nearly balanced, and when intrigue or corruption may be apprehended, the peculiar dress may serve to detect the proceedings of the members, and to signalize what passes among them. Every communication among them becomes more manifest, and attracts the public attention.

This method, I allow, is not of great force; but if it be possible, without inconvenience, to throw one additional grain into the scale of probity, it ought not to be neglected.

6. In a popular tumult, such as every political assembly is exposed to see arise around it, a dress which announces the dignity of him who wears it, may dispose the people to respect, and give the members more influence in calming the storm.

7. If the tumult runs so high as personally to menace certain members of the assembly, the simple act of laying aside their peculiar dress would favour their retreat. The Chancellor Jefferies, so noted under James II. for his bloody decisions, succeeded, by laying aside the marks of his dignity, in eluding for a time the fury of the populace.

These different reasons are not equally applicable to all political assemblies.

§ 2. *Of the manner of placing the Members, and of a Rostrum for the Orators.*

In a numerous deliberative assembly, there ought not to be any predeterminate places. Every one ought to take his place as he arrives.

This free arrangement is preferable to a fixed order, for many reasons; and first, because it tends to produce a debate of a better kind.

The members of the same party ought to possess every facility for concerting their operations and distributing their parts. Without this concert, it is impossible that the arguments should be presented in the most suitable order, and placed in the most advantageous light. It is only by a continual correspondence among the members themselves, that they can prevent a multitude of useless operations, delays, contradictions, repetitions, inconsistencies, and other incidents, of which the common tendency is to interrupt that unity of plan which is necessary in conducting business to its termination. In this respect, party interests are the same as those of the public. It is necessary for the public good that each party should plead its cause with all its force — should employ all its resources; since truth only has everything to gain in the concussion.

Consultations held previous to the assembly, cannot supply these little consultations at the moment. One particular observation, one new proposition, may give a new aspect to affairs, and render necessary a change of measures. The most consummate foresight cannot anticipate all the incidents which may arise in the course of a discussion. It is here as in a battle,—the best plan previously formed cannot supersede the necessity of occasional orders suggested at the instant by the events of the day.

The English practice is conformable to this theory. The arrangement being free, the two parties naturally place themselves upon the two sides of the House. The first bench upon the right of the Speaker, which is called the Treasury Bench, is occupied by the ministers and other official persons; but this is a matter of courtesy, and not of right. The first bench on the Speaker's left, is that occupied by the principal persons of the opposition party.

There is one single exception to this freedom of places — an exception, honourable in principle, but too rare in practice to be productive of inconvenience. "It is commonly understood," says Mr. Hatsell, (Vol. II. p. 194,) "that members who have received the thanks of the House in their place, are entitled to that place whenever they come to the House, at least during that parliament; and it is generally allowed them by the courtesy of the House."

In the House of Lords, different benches are appropriated of right to the different orders, — one to the Bishops, another to the Dukes, &c.; but these appropriations are but slightly observed.

The States of Holland and West Friesland used to assemble in a hall, in which, to judge from appearances, the fixation of places was most strict. Each town had its bench, or its part of a bench The places being al. occupied, no one could change without occasioning some derangement. Whether any inconveniences were the result or not, is a matter of conjecture, and nothing more. Since everything passed in secresy in these Dutch assemblies, they never understood the essential connexion between liberty and publicity which support each other.

This free arrangement is favourable to equality, in a case in which equality, not being hurtful to any one, is justice. To prevent disputes concerning precedence, those vain contests of etiquette which have so often been the principal object of attention in great political assemblies, would be in itself a great good. To correct the disposition itself which attaches importance to these distinctions, is a still greater advantage. The mode by which this scheme of graduated injuries is carried into effect, is begun by supposing that one place is preferable to every other, and that the occupation of it is a mark of superiority. This system of insults, which goes on regularly increasing from the last to the first place,

is what is called *order*, *subordination*, *harmony;* and these honorary distinctions—that is to say, these gradations of affronts—given and received with privilege, are commonly regarded with more respect, and defended with more obstinacy, than the most important laws.

This, then, is one cause of contention and trifling, which ought to be excluded from a political assembly. Distinction of places, and disputes concerning rank, ought to be unknown there. *Merita sua teneant auctores, nec ultra progrediatur honos quam reperiatur virtus.*

In England, a quarrel respecting precedence is sometimes heard of, but it is only in assemblies for amusement; most generally among females, and only among themselves. If these disputes reach the men, they treat them as a joke.

Ought there to be a place assigned for those who speak?

Before answering this question, two points ought to be determined,—the form and size of the place of meeting, and the number of members.

In a numerous assembly, the speaker is best heard when he speaks from a tribune, placed near the centre and visible to all. The debate, more easily followed, causes less fatigue. Those who have weak voices, are not obliged to strain themselves that they may make themselves heard at the extremities; and this is a consideration which ought not to be disregarded in a political assembly, in which there ought to be a large proportion of aged and studious men.

Regularity is better preserved. If every member may speak from his place, there is at least a danger of confusion, and it is more difficult for the president to prevent irregular interruptions. The necessity of going to the tribune, stops a crowd of insignificant and precipitate proposals. It is a deliberate act, which an individual will hardly perform without having first considered what he intends to say: it makes him conspicuous, and he must feel that it is ridiculous to fix attention upon himself, when he has nothing to say wherewith to repay that attention.

Besides, when a tribune is established as the place from which to speak, all the rest of the assembly ought to be obliged to be silent. If any one speak out of the privileged place, he commits an obvious irregularity, and may immediately be called to order.

The tribune presents also a certain advantage connected with impartiality. If the assembly, according to the disposition of all political bodies, form itself into two parties, each naturally tends to station itself in a certain portion of the place of meeting; and if each one speak from the midst of his party, it is known beforehand on which side he is going to speak: but there are always some men more or less impartial and independent. It is well, therefore, to require all the members to speak from a tribune, which being the same for all, relieves the individual from the association of ideas which would connect him with a given party. It must, however, be acknowledged, that this method is not perfectly effectual, because all the members know each other; but it is well calculated to have this effect with the public who listen to him, and who would be thus called upon to judge the speaker by what he says, and not by the place from which he speaks.

It may be objected, that this is a restraint, and that this restraint may deprive the assembly of the information possessed by a timid individual, who would fear to push himself forward upon the scene in too marked a manner.

It may be said, that a loss of time would result from it, if, for a single word, a short explanation, a call to order, it were necessary to cross the house, and to ascend the tribune.

These two objections are of very little value. The first supposes a degree of timidity which is soon overcome by use: a practised speaker will speak from one place as well as another; but he will speak best when he is best heard: he will speak more freely, or he will speak with less effort.

As to short explanations, the president might permit a member to make them without quitting his place. These are minutiæ, with respect to which a routine of detail will readily be formed.

The two houses of the British parliament have no tribune, and no great inconvenience results from the want. It must be observed at all times, that these assemblies are rarely numerous, that there are few habitual orators, and that those almost always occupy the same places. But when a member speaks from a distant seat, he speaks under manifest disadvantage. He is less heard by the assembly, and often not heard at all in the gallery. There are few important debates in which the reporters for the public papers are not obliged to omit certain speeches, of which only scattered sounds and broken phrases have reached them.

§ 3. *Of the hours of business, fixed or free.*

It is very necessary to have a fixed hour for the commencement of business.

But is it proper to have a fixed hour for breaking up the sitting, although in the middle of a debate? There ought to be a fixed hour, or very nearly so; but it should be admissible to finish a speech which is begun.

This regulation appears to me very reasonable, and more important than would be imagined at the first glance.

With reference to the personal convenience of individuals, this fixation of the hour is useful to all, and necessary for the infirm and the aged. An inconvenience which may deter feeble and delicate persons from this national service, is worthy of consideration.

But the principal reason is, that there is no other method of securing to each subject a degree of discussion proportioned to its importance. When the duration of the debate is unlimited, the impatience of those who feel themselves the strongest, will lead them to prolong the sitting beyond the term in which the faculties of the human mind can exercise themselves without weakness. The end of the debate will often be precipitated, if it be only from that feeling of uneasiness which results from fatigue and ennui.

In those circumstances in which parties are most excited — in which each of them, awaiting the decision, would be most desirous of exceeding the ordinary time — it is then that the rule would be particularly useful: by interrupting the debate, it favours reflection, it diminishes the influence of eloquence, it gives to the result a character of dignity and moderation.

1. But it will be said, delay results from it. Those who dread being found in a minority will prolong the debates, in the hope that another day may give them some advantage.

I think that a systematic plan of delay, founded upon this law, is but slightly probable. The individual who should speak merely to consume the time, would do too much injury to himself. To talk to no purpose, in an assembly in which are heard the murmurs of indignation, and before the public which judges you, is a part which demands a rare degree of impudence; and, moreover, it would be necessary to suppose that a great number of individuals should enter into this disgraceful conspiracy, in order to make it succeed.

2. It may perhaps be said, that it opens a door to intrigue — to that kind of intrigue which consists in personal solicitations to the members, in the interval between two sittings.

But this objection amounts to nothing. There is no greater facility for solicitation after the first debate, than there was before it: there is even less; for those who have announced their opinions, would fear to render themselves suspected by so sudden a change of opinion.

If this objection were solid, it would lead to the conclusion that everything should be unpremeditated in political assemblies — that the object of deliberations should not be previously known, and that the only mode of guaranteeing their integrity is to take them unawares, and to separate them from all communication from without.

English practice.

There is a fixed hour for beginning the sittings; there is none for their termination. Hence, debates which excite great interest have sometimes lasted from twelve to fifteen hours, and even beyond that.

The inconveniences which result from this practice are sufficiently numerous; but there is no danger, at least with regard to *projects of laws*, because the regulations secure certain delays. Every bill must be read three times, besides being discussed in committee. Two adjournments are therefore necessary, and there may be a greater number.*

The sittings do not generally commence before four o'clock, and even later. This arises from the composition of the assembly. The ministers are engaged in the morning in their offices; the judges and lawyers in the courts of justice; a great number of merchants are necessarily occupied with their business. The different committees of the house require the attendance of a multitude of persons, and this service, in a large city, can only be conveniently rendered during the day.

These circumstances have caused evening sittings to be preferred, notwithstanding the inconvenience of prolonging the debates far into the night — of often producing precipitation, from the desire of concluding them — of affecting the health of delicate persons, and of exposing this public service to the formidable concurrence of all the dissipations of a large city. If the ancient usage of assembling in the morning were re-established, this change alone would necessarily change the composition of the House of Commons.

§ 4. *Duty of attendance — Mischiefs resulting from non-attendance.*

I begin with two propositions: — the first, that in every legislative assembly the absence of the members is an evil; — the other, that this evil is sufficiently great to justify a law of constraint.

The inconveniences may be ranged under six heads: —

1. Facility of prevarication.
2. Occasion of negligence.
3. Admission of less capable individuals.
4. Inaction of the assembly, when the number requisite for the validity of its acts is not present.
5. Danger of surprises.

* The Roman senate could not begin any business before the rising of the sun, nor conclude any after its setting. This was a precaution against surprises; but the English method is much preferable. Demosthenes caused a decree to be passed by surprise, after the party opposed to his had retired, believing the sitting finished. Such an event could not have happened in the British senate.

6. Diminution of the popular influence of the assembly.

1. *Facility of prevarication.*—There is more than facility — there is entire security, not for complete prevarication, but for demi-prevarication. Suppose a measure so bad that a deputy, if he were present, could not in honour refrain from voting against it. Does he fear to offend a protector, a minister, or a friend? He absents himself: his duty is betrayed, but his reputation is not compromised.

Every voter produces by his vote two equal and distinct effects: he deprives one party of his vote, and gives it to the other. The absent produces only one of these effects, but there is always half the mischief.

2. *Negligence.*—Is one obliged to vote upon all questions? It is natural to pay some attention to them, to make one's self acquainted with them, lest we become absolute ciphers in the assembly. But this feeling of honour does not exist when individuals may freely absent themselves. They will abandon their duty, rather than compromise themselves — they will give themselves up to indolence; and the more they neglect their business, the less will they be qualified to engage in it.

3. *Admission of less capable individuals.* — So soon as an employment becomes a source of consideration and of power, without imposing any restraint, it will be sought after — will be bought and sold, by men who have neither inclination nor power to render themselves useful in it.

Such places will often become the appanage of fortune and dignity; but if it be requisite assiduously to discharge their functions, the little motives of vanity will not outweigh the bonds of labour. We shall only find among the candidates those who discover, in these public duties, some particular attractions; — and though inclination for an employment does not prove talent for its discharge, there is no better pledge of aptitude for the labour than the pleasure which accompanies it.

4. *Inaction for want of the number required.* — This evil is connected with the preceding. So soon as the places are occupied by men who only love the decorations they afford, they will neglect to attend, at least upon ordinary occasions. It will become necessary to fix a quota for forming an assembly, and this expedient will itself produce many days of inaction.

5. *Danger of surprises.*—We may consider as a surprise, every proposition the success of which has resulted from absence, and which would have been rejected in the full assembly.

6. *Diminution of influence.*—Public opinion in a representative government is naturally disposed to conform itself to the wish of the assembly, and requires only to know it. But will the wish of the whole assembly be the wish of that portion from which the decision emanates? It is this which becomes more problematical, in proportion as this part is less than the whole. Is the part absent greater than that which is present? The public knows not to which to adhere. In every state of the case, the incomplete assembly will have less influence than the complete assembly.

§ 5. *Means of insuring attendance.*

I confine myself here to the general idea. The first of these means would consist in requiring of each member a deposit, at the commencement of each quarter, of a certain sum for each day of sitting in the quarter; this deposit to be returned to him at the end of the term, deduction being made of the amount deposited for each day for every day he was absent.

If the members receive a salary, this salary should be placed in deposit, subject to being retained in the same manner.

This retention should always take place without exception, even in those cases in which there are the most legitimate excuses for absence.

This plan may at first appear singular, but this is only because it is new. This, however, is not a feasible objection to it, if it be particularly efficacious. It belongs to that class of laws which execute themselves.* If instead of this retention you establish an equal fine — there then becomes necessary an accuser — a process, a judgment: on the other hand, the deduction is not liable to uncertainty — it operates after a simple calculation, and does not bear the character of a penal law.

Emoluments are the price of service, — Is there any ground of complaint, if they are attached to the rendering of service?

If the employment be of a kind to be undertaken without salary, the chance of losing a part of the deposit ought to be regarded as the price of the place.

To admit any cases of exception, would be to alter the nature of this instrument. Its essence consists in its inflexibility — admit excuses, you admit fraud, you admit favour; refusal to receive them would become an affront, — you would substitute a penal for a remuneratory arrangement. But it may be said, in case of sickness, is it right to add to this natural misfortune, another factitious evil? Yes, upon so important an occasion. The professional man, the artisan, are subject to the same losses. At the price of this single inconvenience, contraventions without end are prevented, the public service is secured, which could not be secured by any means more easy and manageable.

This expedient itself will not suffice. It is necessary to add to it a coercive punishment; for it is always necessary to come to this, to

* See *Rationale of Reward*, Book I. Ch. IV. p. 198.

give effect to the laws. I only propose one day of arrest for each contravention, it being always understood that every legitimate excuse for absence is admissible as a ground of exemption from this punishment.

This is necessary for constraining a class of persons upon whom the loss of the deposit would have only an uncertain influence.

The rich are often led by vanity to make pecuniary sacrifices: they would not be indisposed to acquire an honourable office, even though it were expensive, provided they were not compelled to attend to its duties; they might even glory in the infraction of a rule when the punishment was only a pecuniary fine. Hence there would perhaps be formed two classes in the assembly — those who were paid for their functions, and those who paid for not fulfilling them; and as wealth sets the fashion, it might happen that a kind of degradation would be reflected upon the useful and laborious class.

A punishment is therefore necessary, which should be the same for everybody — a slight but inevitable punishment. It is true that excuses would be admissible; but it is not to be expected that, for the purpose of avoiding the inconvenience of one day's arrest, any one would compromise his honour by a lie.

These means should also be strengthened by a register, in which every case of absence should be specified. The name of the absent member should be inscribed therein, with the date of his absence, in order to indicate the sitting or sittings from which he was absent, the excuses he has made, or the days during which, he was subject to arrest. This memorial should be printed at the end of every session.

The power of granting leave ought not to exist. This power would soon reduce the demand which was made of it to a mere formality.

If this regulation had existed in the Roman senate, the letters of Cicero would not have contained so many bitter complaints against those senators, who left him to strive alone against corruption and intrigue, that they might enjoy their pleasures in voluptuous repose, or rather that they might avoid compromising themselves, and might prevaricate without danger.

§ 6. *British practice in relation to attendance.*

In order to perceive how far this abuse of absenting themselves may be carried, it is only necessary to consider what happens in England.

In the House of Commons, out of 658 members, the presence of 40 is required to constitute a house, and often this number is not found. Its annals offer few examples of a sitting in which one-fifth of the whole number was not wanting. An opinion may hence be formed of the ordinary attendance. The two parties in this assembly are composed of persons to whom their parliamentary functions are only a secondary object. Setting aside the official personages, and the heads of the opposition who seek to succeed them, there remain lawyers, merchants, and men of the world, who, unless they have a particular interest in the question, only attend the house as a show, for the purpose of varying their amusements. At the invitation of the slightest pleasure they leave the house. It is these persons who in general compose the class whose votes are the object of dispute to the two parties, and to whom they address their pleadings.

Is this the fault of individuals? No; since in this respect as well as in every other, men are what the laws make them to be.

The laws which exist for the prevention of this abuse are well calculated to be inefficacious. In ancient times there was a statute of fines: first, five pounds; afterwards ten, and afterwards forty, &c. This mode is gone by — there remains only imprisonment in the custody of the sergeant-at-arms (this implies a sufficiently heavy ransom under the name of fees.) But even this punishment scarcely exists except as a threat. It cannot take place but upon a call of the house, as if a constant duty ought only to be performed at certain periods; and in the case of a call of the house, any excuse, solid or frivolous, vague or particular, is sufficient to prevent the infliction of this punishment. It is not possible to expect that the tribunal will be severe, when all the judges are interested in the contravention of the laws. Neither can it be expected that a political body will make efficacious laws for the prevention of abuses, in the continuance of which each member finds his account, unless compelled to do so by the force of public opinion.

It must be acknowledged, that this habitual negligence, which has destroyed every other assembly, has its palliatives, which diminish its evil effects, and which are peculiar to the parliamentary régime.

The division into two parties, has insensibly led them to allow themselves to be represented by a certain portion of each. Each portion is as the whole. In questions of importance — that is to say, of an importance relative to the party — the chiefs give the signal, and the members come up in mass.

There is little danger of surprise, because the principal motions are announced beforehand, and because all the ministerial measures pass through many stages, upon different days. If the decision taken by the small number be contrary to the wish of the majority, they assemble in force the day following, and abrogate the work of the previous day.

§ 7. *Of the practice of requiring a certain number to form a House.*

With good regulations against absence, there would be no necessity for a recurrence to this instrument.

Its principal use is to contribute indirectly to the compelling an appearance. Is the fixed number deficient? Business is retarded; public opinion is thought of; an uproar is dreaded. Those who direct the assembly are obliged to take pains to obtain the attendance of the requisite number, and rigorous methods have an excuse if the negligence become extreme.

This fixed quota is the last expedient to which recourse should be had with this view; since the suspension of business oftentimes produced by it, is nothing more than a punishment inflicted upon the constituents, when the representatives only are in fault.

It appears at first extremely singular, that the power of the whole assembly should be thus transferred to so small a portion. It arises from the circumstance, that abstraction made of intentional surprise, nothing more is to be feared from a fraction of the assembly than from the total number. Allowances being made for the differences of individual talents, — as is the whole, so is each part.

If there be no disposition on the part of the whole to prevaricate, there is no reason to attribute this disposition to any portions of the whole. Besides, responsibility with regard to the public is always the same.

It might be apprehended, that where parties existed, those who found themselves one day in superior force, would abuse this superiority to the production of a decree contrary to the will of the majority. But this danger is not great; for the majority of to-morrow would reverse the decree of the past day, and the victory usurped by the weaker party would be changed into a disgraceful defeat.

The general advantage, in case of absence, is altogether on the side of the executive power. It is this which is always in activity — it is this which has all the particular means of influence for securing the assiduity of its partisans.

§ 8. *Visitors — mode of admission.*

We have seen, in the chapter on *Publicity*, the reasons for admitting a certain portion of the public to the sittings of the assembly, and we have pointed out the cases of exception. The number admitted ought to be as great as possible, without injury to the facility of speaking and hearing — a principal consideration, which reduces the size of the place of assembly to dimensions much less than those of an ordinary theatre; since there ought not to be required of a deputy of the people, the strength of voice and the declamation of an actor.

The experience of France has shown other dangers, arising from the number of spectators equalling or exceeding that of the assembly. It is true, that these dangers might have been prevented by a severe police; but this police is more difficult to be maintained, in proportion as the number is large. Besides, there are some men, who, surrounded with the popularity of the moment, would be more engaged with the audience than with the assembly; and the discussion would take a turn more favourable to the excitements of oratory, than to logical proofs.

It would be proper, in the distribution of these places, to allow a particular seat for the short-hand writers; another to students of the laws, who would find there a school and models; another for magistrates, whose presence would be doubly useful. It would be proper also to keep certain places in reserve, at the disposal of the president, for ambassadors and strangers, who would carry from this exhibition advantageous impressions respecting the nation, which would fructify in noble minds. Cyneas left Rome more impressed with respect by his view of the senate, than by all the magnificence of the court of Persia.

With regard to places in the public seats, they should be paid for. This arrangement is most favourable to equality, in a case where equality is justice. If you allow them to be taken by the first comers; when there is a large concourse, many persons will be disappointed. The strongest and the rudest will have all the advantage in the struggle.* The gallery would be filled with spectators, who would be the least profited by the debates, and who have the most to lose by the cessation of their labours. Their number, and their want of education, would often lead them to brave the anger of the assembly, and to disturb its deliberations by their approbations or their murmurs.

If the granting of tickets of admission were in the hands of the government, there would not be persons wanting who would accuse it of partiality and dangerous intention. There! they would say, the ministers have surrounded us with their creatures, in order to restrain our deliberations, &c.

This subject of discontent would be removed, by giving the tickets of admission to the members themselves; and I see only one objection to this: it would restrict the prerogative of publicity, instead of extending it, by making a common right degenerate into a personal favour, and thus opposing the principle of equality without any advantage.†

* It was for a long time a trade among the common people, to seize at an early hour upon places in the gallery of the National Assembly, for the purpose of selling them.

† All this is reconciled in England by an unauthorized but established custom. A small sum

A price of admission unites all the conditions. It is an imperfect measure, it is true, but it is the only possible one, of the value attached to this enjoyment. It is also a proof of a condition in life which guarantees a respectable class of spectators.

This plan, I acknowledge, is not a noble one; but the employment of the produce may ennoble it; whilst, as respects those witicisms which may be borrowed from the language of the theatre, they must be expected, and disregarded.

Ought females to be admitted? No. I have hesitated, I have weighed the reasons for and against. I would repudiate a separation, which appears an act of injustice and of contempt. But to fear is not to despise them. Removing them from an assembly where tranquil and cool reason ought alone to reign, is avowing their influence, and it ought not to wound their pride.

The seductions of eloquence and ridicule are most dangerous instruments in a political assembly. Admit females — you add new force to these seductions; and before this dramatic and impassioned tribunal, a discussion which only possessed the merits of depth and justice, would yield to its learned author only the reputation of a wearisome lecturer. All the passions touch and enkindle each other reciprocally. The right of speaking would often be employed only as a means of pleasing; but the direct method of pleasing female sensibility consists in showing a mind susceptible of emotion and enthusiasm. Everything would take an exalted tone, brilliant or tragical—excitement and tropes would be scattered everywhere; it would be necessary to speak of liberty in lyric strains, and to be poetic with regard to those great events which require the greatest calmness. No value would be put but upon those things which are bold and strong; that is, but upon imprudent resolutions and extreme measures.

Among the English, where females have so little influence in political affairs — where they seek so little to meddle with them — where the two sexes are accustomed to separate for a time, even after familiar repasts, — females are not permitted to be present at the parliamentary debates. They have been excluded from the House of Commons, after the experiment has been tried, and for weighty reasons. It has been found that their presence gave a particular turn to the deliberations — that self-love played too conspicuous a part — that personalities were more lively — and that too much was sacrificed to vanity and wit.

given to the doorkeeper of the gallery, introduces you into the gallery, as well as the order of a member.[a]

[a] This practice is now prohibited, by an order dated July 2, 1836, and no person is now admitted without a member's order.—*Ed.*

CHAPTER V.

OF THE PRESIDENTS AND VICE-PRESIDENTS BELONGING TO POLITICAL ASSEMBLIES.

§ 1. *Of the office of President.**

RULES.

Rule 1. IN every political assembly, there ought at all times to be some *one* person to preside.

* The word *President*, I employ in preference to any other term which the English or any other European language offers as capable of being made to express the function I have in view.

To an Englishman, whose view was confined to his own island, and to the chief governing bodies in that island, *Speaker* is the word which would naturally first present itself. But the term Speaker exhibits the office of president no otherwise than as an appendage to a very different, and now frivolous function, of which hereafter, and of which latter only an intimation is given by this name; — and in relation to the business of debate, it has an incorrigible tendency to produce confusion: it confounds the president with any member whom there is occasion to mention as *speaking*. In the instance in which it is most used, viz. to denote the president in ordinary of the House of Commons, it involves a contradiction; the original propriety of the appellation having in this instance slipped away, and left absurdity in its place. In that House the Speaker, while he officiates as such, is the only person present who neither makes those speeches which all the other members make, nor has any right to do so. In this point of view, it lends countenance to a principle of etymology, generally cited as a whimsical one: *Speaker*, from not speaking; *ut lucus a non lucendo*.

Orator (orateur) is the word by which the English word *speaker* has been usually rendered in the general language of Europe. It is by the same word that the presidency of the three inferior orders of the Swedish diet is rendered in the same language. To the innocent improprieties chargeable on the word speaker, this adds a dangerous one. Oration means supplication; — supplication implies pliancy as towards the person to be addressed: the pliancy of the Swedish presidents as towards the person they had to address, has just[a] consummated the ruin of everything that ought to be dear to Sweden.

The word Chairman is free from the inconvenience attached to the use of the words *speaker* and orator; but it draws the attention to an idea too confined; as if it were necessary to the function that the person who performs it should sit in a chair, and that nobody else should. At times it may even bring up an improper and ignoble idea: several committees being about to sit, a voice is heard in the purlieus of the House of Commons, *Gentlemen, your chairmen wait for you.* Does *chairmen* here mean *presidents* or *porters?*

Marshal is the appellation by which the pre-

[a] Published 1791.

Rule 2. In a permanent assembly, that function is best provided for by a permanent president in chief, with substitutes of equal permanency, in such number, that in case of absence or disability, the place of the chief may at the instant be supplied.

The president ought to be permanent, not only that the embarrassment arising from multiplied elections may be avoided, but especially for the good of his office. If permanent, he will possess more experience, he will know the assembly better, he will be more conversant with business, and will feel more interested in managing it well, than an occasional president. The occasional president, whether he execute his office well or ill, must lose it. The permanent president, who will only lose his office if he discharge it ill, has an additional motive for performing all his duties well.

Rule 3. In the character of president, no more than *one* person ought to officiate at a time.

If there are two, whenever there arises any difference of opinion between them, there will be no decision. If there are more than two, they will form a little assembly, which will have its debates, which will uselessly prolong the business in hand.

Rule 4. But *two* persons at least, capable of officiating, *ought* to be present at *once*.

This rule is necessary, in order to prevent the assembly from being reduced to a state of inaction from the sickness, death, or absence of its president. The omission of so simple and important a precaution, announces so great a want of foresight, that it could hardly be thought that men would be guilty of it, if a striking example were not exhibited by one of the greatest and most ancient of political assemblies.

§ 2. *Functions, competent and incompetent.*

Rule 5. The functions that belong properly to a president, belong to him in one or other of two capacities: that of a *judge*, as between individual members; or that of *agent* of the whole assembly: — as judge, when there is a dispute for him to decide upon; as agent, where there is anything for him to do without dispute.*

Rule 6. As judge, a president ought in every instance, to be subordinate, in the way of appeal to the assembly itself, sitting under another presidence.

Rule 7. As agent, he ought in every instance to be subject to the *controul* of the assembly, and that *instanter*, as to everything transacted in the face of the assembly.

Rule 8. In neither capacity ought he to possess any power, the effect of which would be to give him a controul in any degree over the will of the assembly.

Rule 9. In a numerous assembly,† and in particular in a numerous legislative assembly, a president ought not to be a member; that is, he ought not to possess a right either to make motions, to take part in a debate, or to give a vote.

This exclusion is as much for his advantage as for that of the body over which he presides: —

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sident is designated in the Polish diet; in one of the four orders which compose the Swedish body of that name; and in the provincial assemblies of the noblesse, instituted within these few years, throughout the Russian empire. This term, besides being unexpressive, is liable to objections of a much more serious nature. In the original German, it signified neither more nor less than what we call a hostler or groom — a servant having horses under his care. A horse being an animal of great importance to a barbarian king, to have the care of the king's horses was to be a great man. When not to be military was to be nobody, to be a man in the service of the king was to have a military command. Thus, by degrees, a command over horses has involved, as a matter of inferior consequence, a command over their riders; till at length the title of *marshal*, superior even to that of *general*, is come to denote, in most countries of Europe, the chief military command. But to command militarily, is to command despotically. Accordingly, in the Swedish diet, the nobles, sitting under the command of their marshal named by the king, are to speak or to hold their tongues, as a soldier is to turn to the right or to the left as the commander gives the word. Thus, as will be seen below, ordained Gustavus Adolphus a military king.

Hence, of all the words which ever were, or ever could be devised, to denote the president of an assembly, which is not meant for an army or a puppet-show, the word *marshal* is that which ought most studiously to be proscribed. France, therefore, in giving to the presidents of her national assemblies this simple and expressive name, instead of the swelling and so much coveted title of marshal, has had a fortunate escape.

The length of this note may demand justification, but needs no apology. While minds are led by sounds, and modes of thinking depend on association, names of office will never be of light importance. A king of Poland or Sweden looks upon himself as an injured being, so long as his will meets with any resistance that would not have been made to a king of Prussia or Denmark: and because a president is termed marshal, Sweden is destroyed.

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* For instance, putting the question; declaring the decision from the number of the votes; giving orders to subordinates; giving thanks or reprimands to individuals; or, in short, using, in the name of the assembly, any other discourse of any kind which is not deemed of sufficient importance to be penned by the assembly itself.

† An assembly may in this point of view be deemed too numerous, when it is too numerous for the opinion of each member to be recorded distinctly in his own terms. This takes out of the rule such assemblies, for instance, as the boards of administration, and the principal courts of justice in Great Britain, and the boards established in the dominions of the English East-India Company.

1. It leaves him entirely at liberty to attend to his duties, and the cultivation of the particular talents which they require. If he be called to sustain the character and reputation of a member of the assembly, he will be often distracted from his principal occupation, and he will have a different kind of ambition from that which belongs to his office, without reckoning the danger of not succeeding, of offending, and of weakening his personal consideration by ill-sustained pretensions.

2. This exclusion is founded upon reasons of an elevated nature; it is designed to guarantee him from the seductions of partiality, and to raise him even above suspicion, by never exhibiting him as a *partisan* in the midst of the debates in which he is required to interfere as a *judge* — to leave him in possession of that consideration and confidence which alone can secure to his decisions the respect of all parties.

But it may be said, that the president, no more than any one else, can remain neuter with regard to questions which interest the whole nation — obliged especially as he is to be continually occupied with them, even as matter of duty; that it would therefore be better that he should be obliged to declare himself, and make known his real sentiments, and thus put the assembly upon its guard, rather than that he should enjoy, under a false appearance of impartiality, a confidence which he does not merit.

To this objection there is more than one answer: First, It cannot be denied, that so long as his internal sentiments have no undue influence upon his external conduct, they are of no consequence to the assembly, but that he cannot declare them without becoming less agreeable to one party — without exposing himself to a suspicion of partiality, which always more or less alters the degree of confidence.

Secondly, If you permit him to remain impartial, he will be so more easily than any one else. He will regard the debates under altogether a different point of view from that of the debaters themselves. His attention, principally directed to the maintenance of form and order, will be withdrawn from the principal subject. The ideas which occupy his mind during a debate, may differ from those which occupy the actors in it, as much as the thoughts of a botanist who looks at a field may differ from those of its owner.

Habit facilitates these sorts of abstraction. If it were not so, how could judges, full of humanity, fix their attention with a perfect impartiality upon a point of law, whilst a trembling family stood waiting beneath their eyes the issue of their judgment.

It follows from what has been said, that in a numerous political assembly, in which it is to be expected that passion and animosity may arise, that he who is called upon to moderate them, ought not to be obliged to enrol himself under the banners of a party, to make himself friends and enemies, to pass from the character of a combatant to that of an arbitrator, and to compromise by these opposite functions the respect due to his public character.

There have been assemblies which have only given a vote to the president when the votes have been found equal. This mode is more opposed to impartiality than that of allowing him to vote in all cases, and there is no reason which can be assigned in its favour. The most simple and natural plan to adopt in case of equality, is to consider that the proposition which has not had the majority of votes is rejected. In matters of election, it would be better to resort to lot, than to give the preponderant voice to the president. The lot offends nobody.

§ 3. *Sequel. Choice.*

Rule 10. In a legislative assembly, or any other free and numerous political assembly, a president ought in every case to be chosen freely and exclusively by the assembly over which he is to preside.

Rule 11. In the choice of a president, the votes ought to be taken in the secret way, and the majority ought to be an absolute one.*

Rule 12. A president ought ever to remain removable by the assembly at its free pleasure, but not by any other authority.

Rule 13. In a permanent assembly, on the occasion of choosing a permanent president, if there be no other president in office, it may be better to accept a president *pro re natâ* from without doors, upon the ground of any claim, however slight, if single, than to stand in that instance upon its liberty of choice.†

Rule 14. So for all kinds of business in an assembly, which, however free, is but occasional.‡

§ 4. *General Observations.*

A very simple observation will furnish a clue to all the reasons that can be produced or required in support of the propositions

* In contradistinction to a comparative one: *i. e.* if there be a number of candidates, the having more votes than any other candidate ought not to determine the election, unless he who possesses such comparative majority have a majority of the whole number of the votes.

† For instance, where a king or other chief magistrate in any state institutes a new assembly, or convokes one not already provided with one by ancient designation, it might be of use that he should name a president for this purpose only.

‡ Thus, in an English county meeting, it may be better to accept of the presidency of the sheriff, though an officer of the king's appointment, than to consume the time in debating who shall fill the chair.

above laid down. Throughout the whole business, the grand problem is to obtain, in its most genuine purity, the real and enlightened will of the assembly. The solution of this problem is the end that ought everywhere to be had in view. To this end, everything that concerns the president ought of course to be subservient. It is for the sake of the assembly, and for their use alone, that the institution of this office is either necessary or proper. The duty and art of the president of a political assembly, is the duty and art of the *accoucheur: ars obstetrix animorum*, to use an expression of the first Encyclopedist and his not unworthy successors; — to assist *nature*, and not to force her — to soothe, upon occasion, the pangs of parturition — to produce, in the shortest time, the genuine offspring; but never to stifle it, much less to substitute a changeling in its room. It is only in as far as it may be conformable to the will of the assembly, that the will of this officer can, as such, have any claim to regard. If, in any instance, a person dignified with any such title as that of president of such or such an assembly, possess any independent influence, such influence, proper or improper, belongs to him, not in his quality of president, but in some foreign character. Any influence whatever that he possesses over the acts of the assembly, otherwise than subject to the immediate controul of the assembly, is just so much power taken from the assembly and thrown into the lap of this single individual.

It follows, that nothing ought to be permitted by the assembly to be done by a president, that the assembly itself could do in the same space of time.

In the case of an assembly and its president, we see judicial power in the simplest form in which it can exist, and in the simplest set of circumstances in which it can be placed. The judge single: the parties acting all the while under his eye. Complaint, judgment, execution, treading with instantaneous rapidity on the heels of contravention. Happy the suitor, if, in the other cases of procedure, instead of complication and delay, this simplicity of situation and celerity of dispatch had been taken for the standard of comparison and model of imitation, by the founders and expositors of law.

The regulations which have been proposed above appear so simple and so suitable, that it is natural to suppose that they would have presented themselves to all political assemblies.

But if we proceed to consider what has been practised among different nations, we shall find that almost all these rules have been forgotten. The English system, which most nearly approaches to them, differs in an essential point. It allows the president to deliberate and vote. All establishments have commenced in the times of ignorance: the first institutions could only be attempts more or less defective; but when experience renders their inconveniences sensible, the spirit of routine opposes itself to reform, and also prevents our perceiving the true sources of the evil.

CHAPTER VI.*

OF THE MODE OF PROCEEDING IN A POLITICAL ASSEMBLY IN THE FORMATION OF ITS DECISIONS.

§ 1. *Introductory Observations.*

THE subject we are now about to engage in, is in its own nature abstract, intricate, and obscure. Of these undesirable qualities in the

* This chapter was originally published in 4to, in the year 1791. In the preface to that publication it is stated, that "the circumstance which gave rise to the publication of this detached chapter, was the notification that had been given of the then approaching meeting of the French States-General, since termed the National Assembly.

"As to the particular matter of the present Essay, preceded, as it required to be, by several other matters, as well in respect to the chronological order of the subjects treated of, as in respect to the order that seemed most favourable to investigation, it presented itself as second to none in the order of importance.

"What was more, the very rules that suggested themselves as necessary to every assembly, turned out to be the very rules actually observed in both assemblies of the British legislature. What theory would have pitched upon as a model of perfection, practice presented as having been successfully pursued: never was the accord more perfect between reason and experience.

"The conjuncture which gave rise to the publication seemed to be such as would give it its best chance of being of use. A political assembly, selected from the whole body of a great nation, were about to meet for the first time. Everything that concerned them was as yet new to them: everything was as yet to create. They were in the situation of a manufacturer, who besides the work that was the object of his manufacture, should find himself under the necessity of making the very tools he was to work with. The presenting these new manufacturers with a new set of tools, with a description of their uses — tools whose temper had been so well tried — was the object of the present design.

"The subject, however, taken in its full extent, and handled in the manner in which it was endeavoured to be handled, was far too extensive for the time. All that could be done at the moment, was to select for immediate publication what seemed to stand first in the order of importance. By forced exertions, the part now published was accordingly printed off; and, of a few copies that were sent to Paris, the last sheet reached that metropolis a day or two after the first formal meeting of the assembly, and before any business was begun upon. Of these copies one having found its way into the hands of the Comte de Mirabeau, the sheets, as fast as they came over, had been honoured, as I afterwards learned, with

subject, but too strong a tincture must inevitably be imbibed by the work. To judge by the celerity with which a *motion* is oftentimes made, and an order framed in conse-

a translation, either by the pen of that distinguished member, or under his care.

"Congenial affections had happened about the same time to give birth, without my knowledge, to a little tract that promised to afford not only furtherance to the design, but assistance towards the execution of this larger enterprise. To deliver the theory of a copious and unattempted branch of political science, was necessarily a work not only of time, but of bulk, and would require more paper than could, at the ordinary rate of business, make its way, in the course of several months, through the press. Practice itself, stated simply and without reasoning, might be comprised within limits much less extensive. Moved by these considerations, a gentleman eminently qualified for the task, had undertaken, much about the same time, this philanthropic office. His valuable paper was sent over in manuscript: a translation of it was not only made, but soon after published, by the procurement of the celebrated Frenchman above spoken of, whose name stands in the title-page.[a]

"To judge from the temper and modes of thinking that had so long appeared prevalent in the French nation, the larger of these works, if tolerably performed, and the other, almost at any rate, seemed to possess a fair chance of engaging some attention, and of being turned to some account in practice. The prepossession so generally entertained in favour of English law, had been nowhere more strenuous, more general, or more liberally avowed, than among our nearest neighbours. If such was the case with regard to points in relation to which both countries had possessed the advantage of practice, it seemed still more natural that it should be so with regard to points like these, in relation to which the whole stock of experience had fallen exclusively to the share of that country, to whose example the other had been used to look with so favourable an eye. To judge beforehand, the danger seemed to be, that English practice at least, whatever might become of English doctrine, so far from being slighted, should meet with an adoption rather too general and indiscriminate. What seemed to be apprehended was, rather that the dross should be taken up and employed, than that the sterling should be rejected. To make the distinction as plain as possible, was therefore all along one of the principal objects of my care.

"With these expectations the event has, it must be confessed, but indifferently accorded. Howsoever it has happened, both these labours, for any good effect they seem to have had in the country to whose service they were dedicated, might as well have been spared. Of the theoretical Essay, the translation has not been so much as published: and the practical might as well not have been published, for any use that seems to have been made of it. Of the theoretical tract, the author was indeed given to understand at the time, that it had made as many proselytes as it had found readers. But this it might easily do, without having much success to boast of: for at that busy period, the time of the leading people in that country was, as it still continues to be, so fully occupied by the conversation which the topics of the day furnished in such abundance, that the faculty of reading, as to everything but what absolute necessity forced into men's hands, seems to have been almost laid aside.

"Be that as it may, from any effect that has manifested itself, either in the rules or the practice of the French Assembly, few or no indications have appeared, from which it can be inferred that either British practice, or British reason, or both together, have met with that attention that either alone had some title to expect. A few English expressions, and some of them too misapplied, compose nearly the whole of what France has drawn upon us for, out of so large a fund.

Has she reason to congratulate herself on this neglect? On the contrary, scarce a day that she has not smarted for it: nor has the wisdom of these rules received a farther, or more illustrious demonstration, from the beneficial consequences that have attended the observance of them in the one country, than from the bad effects that have resulted from the non-observance of them in the other. How often has the assembly been at the eve of perishing, by the mere effect of the principles of dissolution, involved in its own undigested practice! What a profusion of useless altercation, what a waste of precious time has been produced, by doubts started, and disputes carried on, concerning the terms of a decree, days after the decree has been supposed to have been framed! A sort of dispute which never has arisen for ages, nor ever can possibly arise under the British practice — the only practice on this head reconcileable to common sense. The minutes of the proceedings — a work performed with the utmost exactness and punctuality in the House of Commons by a single clerk — exercises the patience, and finds full employment for the time and ingenuity of six members of the National Assembly of France. In London, the publication of this work is as regular as that of a daily newspaper: while, in the corresponding work at Paris, the series of numbers has been commonly at least ten days or a fortnight in arrear, besides being broken by frequent gaps, and disturbed by second editions correcting and cancelling the first.

"Little by little, the practice relative to these points has, it is true, already undergone some improvements. Well might it: for, if it had not, instead of going on ill as it does, it could not have gone on at all: and so far as, with relation to these same points, it has been altered and improved, so far has it been brought nearer and nearer to the British practice, as delineated and justified by the ensuing pages.

"As to the present detached Essay, a natural question is, how it happens, that being but a part, and that not the first, it comes now to be published separate from, and before the rest? — The answer is, that though but a part, it is, as far as it goes, complete within itself; and, as to every purpose of intelligibility, completely independent of everything that was designed to precede or follow it. Observing it thus circumstanced, it has occurred to me that the sheets might as well be transferred to the booksellers, as remain any longer an incumbrance to the printer. Should it, in this country, be found to afford half an hour's amusement to half an hundred thinking individuals, the publication will have done its office."

[a] See the collected edition of Dumont's Bentham, (Brussels, 1289,) I. 453, *et seq.*

quence, the path may at first glance appear short and simple. But, in this as in other instances, practice may be short and simple, where description and discussion are tedious and involved. To put in action the whole muscular system, is the work but of an instant; but to describe the parts concerned in that action, and the different modifications it admits of, is to exhaust the stores of a copious and recondite science.

For affording a clue to this labyrinth at the first entrance, no expedient seemed to promise better, than that of singling out, and laying before the reader at one view, the essential points upon which the due conduct of the business seemed principally to turn; suggesting at the same time such regulations as the dictates of utility seemed to prescribe in relation to those points. Chronological order, the order of the incidents, has for this purpose been broken in upon, lest these points of primary importance should have been lost, as it were, in the multitude of less essential details. But though broken in upon, it is not anywhere reversed: and, in the subsequent discussions, strict order will reassume its empire.*

On these few points turn the essential differences between the British and (what, as far as I have been able to learn, has been) the French practice in this line. In these points, too, if the reasoning which the reader will find as he advances be not erroneous, resides the singular excellence, or rather exclusive fitness, of the former mode.

In matters of inferior importance, invention has been set to work; in these, though equally disposed to have hazarded invention, I have found nothing to do but to copy.†

In this bye-corner, an observing eye may trace the original seed-plot of English liberty: it is in this hitherto neglected spot that the seeds of that invaluable production have germinated and grown up to their present maturity, scarce noticed by the husbandman, and unsuspected by the destroyer.

The importance of these uninviting forms is no fine-spun speculation — no fanciful conceit. Political liberty depends everywhere upon the free action and frequent and genuine manifestation of the public will: but the free action and genuine manifestation of that will, depend upon the mode of proceeding observed in going through the several steps that must be taken before any such result can be produced.

Without any such regulations as those here insisted on—in short, without any regulations at all — a general will, or pretended general will, may come now and then to be declared. But of what sort? Such an one as the will of him who gives his purse to save his life, or signs a deed he never read, or takes an oath with an *et cætera* at the end of it, is to the free and enlightened will of the individual. Without rules, the power of the assembly either evaporates in ineffectual struggles, or becomes a prey to the obstinate and overbearing: *Detur fortiori*, or rather *robustiori*, would be its proper motto. Unanimity may glitter on the surface: but it is such unanimity as famine and imprisonment extort from an English jury. In a system of well-digested rules, such as the English practice, with little improvement, would supply, will be found the only buckler of defence that reflection can have against precipitancy, moderation against violence, modesty against arrogance, veracity against falsehood, simplicity against deception and intrigue.

Without discipline, public spirit stands as poor a chance in a numerous assembly, as valour in the field.

Happily the peaceful branch, though hitherto less understood than the military, is neither quite so difficult to learn nor quite so burthensome to practise. The essential articles of it will be found comprised within the compass of a page.

It is the want of such a general will, the natural effect of the total want of discipline, that has been the great cause of the inefficiency and inutility so justly imputed to all former assemblies of the States-General of France; or, to speak correctly, it is in the non-formation of such will — in the perpetual failure of whatever efforts have been excited by the desire of forming one, that this inefficiency has consisted. But a political body lives only by the manifestation of its will. Here, then, intelligence is power; and to administer intelligence, is to give life.

The spirit of the people, the generosity of its superior classes, the unexampled virtue of the Sovereign, and the wisdom of the minister, all concur in promising to France a constitution which may soon be an object of

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* Order, useful as it is in general to facilitate conception, and necessary as is the assistance it affords to the weakness of the human faculties, is good for nothing else: so that in the few cases where instruction can be administered to more advantage by dispensing with the laws of order than by the observance of them, to adhere to those laws with an inflexible pertinacity would be to sacrifice the end to the means.

† I speak of the regulations themselves: for, as to the principles by which the propriety of regulations is to be tried, and the particular reasons on both sides deducible from those principles, these are matters which lie still open to the researches of invention in every province of the demesnes of law.

Considerations of expediency may have influenced practice long before they have found their way into books, or even into discourse. But, where this is the case, to report is to invent; for reason, till clothed in words, is scarce deserving of the name: it is but the embryo of reason, scarce distinguishable from instinct.

envy, if it is not of imitation, to Great Britain. But inestimable as such a blessing would be, the benefit derivable from it will be found to hang upon so slender, and to many an eye imperceptible a thread, as the system of tactics, or the no-system, which in the form of their proceedings the regenerated assembly may happen to embrace. The pains employed in the construction of this great instrument of public felicity will prove but lost labour, if the only true method of working with it remains unpractised.

Powerful talents, and public-spirited dispositions, comprise the utmost good which the best possible constitution can produce. But of what avail are talents and dispositions, so long as either no decision is formed, or none that answers to its name?

Considerations of such essential importance as I shall have occasion to bring to view, can scarcely indeed at this interesting crisis, and at this era of inquiry, have escaped altogether the researches of an acute and ingenious nation; and the labours of many a pen better suited to the task have probably been employed ere now upon this great object. But as the success with which the public is served, depends upon the use which each man makes of his own powers, and not upon the reliance he places on those of other men — as this, like any other subject, may profit by being exhibited by different writers in different points of view — and as the mention of these more striking articles would be necessary, were it only to save the chain of reasoning that connects the whole, from appearing broken and obscure, the importance of them did not seem a sufficient warrant for the omission either of the provisions themselves, or of any part of the reasoning by which that importance is holden up to view.

In my endeavours to communicate such lights as my researches may be able to throw upon the subject, the following is, in general, the method I pursue: — In the first place are exhibited such *regulations*, relative to each head, as the dictates of utility appear to recommend; in the next place are subjoined, in the way of question and answer, the *reasons* by which such provisions came recommended to my notice.* After that, follows a view of the *British practice*, relative to the points in question; after that again, a view of what I have been able to collect relative to the *French practice*, the justification and confirmation of which, where it appears right — the correction of it, where it appears wrong — and the completion of it, where it appears deficient, is the principal object of the present work. Lastly, where occasion seemed to require, a few general *observations* are subjoined, containing such remarks as could not conveniently be brought under any of the former heads; particularly for the sake of placing different branches of the subject in a comprehensive and comparative point of view.

For the purpose of giving an idea of the French practice relative to these points, the fairest specimen, and that which would have rendered every other of small importance, would have been that of the States-General of France. But of this practice, it seems to be agreed that no documents are to be found. One may even see *à priori*, that nothing of the kind could well have had existence. Between the want of efficiency and the want of form, the connexion is in this instance so natural, that, in default of positive proofs, either of those circumstances might serve as a presumptive evidence of the other. If their proceedings had been attended with any effect, we should have seen the mode in which they proceeded: if their mode of proceeding had been in any tolerable degree suited to the purpose of giving birth to a general will, a general will would at times have been formed; and, being formed, would have been productive of some effect. *Nihil fecit* is the phrase in which some of the monkish historians have comprised the history of several of their kings.† The same history, with a small addition, may serve for all their national assemblies: *nihil fecerunt* gives the catalogue of their acts; *nullo modo*, the form of their procedure.

Failing this source of intelligence, the next one should naturally turn to, is the practice of the few provincial states of ancient institution still subsisting in that great empire.‡ From the journals of these assemblies, if made public, intelligence more or less satisfactory relative to this head could not but be afforded; but unfortunately I have not been able to hear of any such publication, and from circumstances I am strongly led to think no such publication has ever been made.

The only remaining source is that afforded by the modern provincial assemblies, instituted at first in two provinces only,‖ by way of experiment, in the years 1778 and 1779, and at length in the year 1787 communicated to the whole kingdom. The regimen established in these assemblies, if it does not give the most ancient mode of proceeding known in France, gives, what for the purposes of instruction is much more valuable, the latest.

* These reasons bear each of them a relation to some particular principle of the number of those laid down in Chapter I. This will account for their being conceived in a form not always the most natural, and which consequently, were it not for the advantages dependent upon this sort of symmetry, would not have been the most eligible.

† Meaning by *nothing*, the foundation of no monasteries.

‡ *Viz.* Brittany, Languedoc, and Burgundy.

‖ Berry and Haute Guyenne.

It is more so, in as much as through this medium may be obtained some sort of oblique view of the mode of proceeding observed in the old established provincial states. For, in drawing up a code of regulations for the first instituted of the provincial assemblies, those established for the provincial states compose the model which the committee employed on that business expressly declare themselves to have taken for the basis of their work.* In this code, adding to it the materials furnished by the succeeding establishments of the same kind, we may therefore view the quintessence of that part of the national stock of wisdom which has applied itself to this important subject.

Partly for shortness, partly for precision's sake, I have chosen all along, as far as the nature of the case would give leave, to exhibit the proposed regulations in the very words in which they might be couched. This practice, which in all authoritative compositions of this nature will be seen to be absolutely necessary, is, in unauthoritative ones, highly useful at least, and convenient. By specification, description is saved, attention arrested, and expectation satisfied: description, however well performed, leaves the main work still undone.

§ 2. *Principal points to be attended to in the mode of proceeding relative to the formation of the acts*† *of a political assembly.*

1. IDENTITY of the terms of the *proposition*‡ with those of the *act* proposed.

2. FIXATION of the terms of the proposition by *writing*.

3. UNITY of the subject of debate kept inviolate.

4. DISTINCTNESS of the process of *debating* from that of *voting*.

5. In *debating*, NO FIXED ORDER of pre-audience.

6. The *votes* given not one after another, but ALL AT ONCE.‖

Regulations proposed relative to the above points.

ARTICLE I. Nothing shall be deemed to be the act of the assembly, that has not been proposed in and to the assembly by a motion made for that purpose,* put to the vote, and adopted by the majority of the votes.†

ART. II. Every proposition, designed to give birth to an act of the assembly, shall be exhibited in *writing* by the mover, and conceived in the very terms, neither more nor fewer, by which it is designed such act should stand expressed.‡

ART. III. A proposition of any kind having been once received, — until that proposition has been disposed of, no other motion shall be made, unless for one or other of three purposes: —

1. To offer an *amendment* to the proposition already on the carpet;

2. To propose a mode of putting an end to the business without decision; or

3. To reclaim the execution of some law of order at the instant of its infringement.

ART. IV. The process of *debating* and that of *voting* are distinct processes; nor shall the latter be entered upon till after the former is gone through.

ART. V. In debating, no member, after the author of the motion, shall have the right of speaking before any other,‖ but [he who first offers himself shall be first heard,§ or else] the competition for pre-audience shall be decided by lot.¶

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* Procès-Verbal de l'Assemblée Provinciale de Berri, 23 Novembre 1778. The declaration here spoken of does not, it is true, in express terms comprise any other regulations than those relative to the "*convocation* and the *formation*" of the assemblies in question; but, as the committee who on that day presented a code of regulations relative to those two heads, are the same also who, three days afterwards, present another code relative to the *mode* of *proceeding* to be observed, it cannot be supposed that the documents, which had been taken for a model on the first of those occasions, were neglected on the second.

† *i. e.* as well momentary and particular *orders* and *resolutions* as permanent and general *laws*; so likewise *addresses*, declarations of *opinion* (termed also *resolutions* in the British practice,) and *reports*.

‡ *i. e.* whether *motion* or *bill*, or draught of any other sort of act of assembly, not comprised under the name of *motion*.

‖ This last point is not altogether of equal importance with the preceding ones: but as it is so naturally connected with the 4th and 5th, and concurs with them in marking the opposition between the French and British practice, it was not thought worth while to separate it from them.

* This is according to the British practice. In two subsequent chapters relative to the previous promulgation of motions and bills, I shall have occasion to propose an additional mode of introducing propositions; which mode, if adopted, would require an alteration to be made in the penning of this article: but, however different from this in other respects, it is, with respect to the points here noted, grounded on the same principles.

† *i. e.* by at least a *comparative* majority of the number of voters *present*. Shall the majority of the voters *present* be sufficient, if it falls short of amounting to a majority of the whole number of persons entitled to vote?

‡ Form for a motion; *i. e.* for the introducing of a proposition: — "I, the undersigned, propose the Draught following, to be made an Act of the Assembly." (Signed) "A. M."

N. B. — Then give the order, resolution, address, report, bill, or whatever other act it be, *in terminis*, whether it consist of six words or six hundred pages, beginning with its title, when it has one.

‖ In a subsequent chapter, I endeavour to show that the author of a motion ought to be heard in support of it, immediately *after*, but not, as is the British practice, *before* he makes it.

§ ¶ The passage in brackets expresses the British practice; the remainder, an operation

ART. VI. Votes, when given openly, shall be given, not one after another, but as near as may be, all together.

§ 3. — POINTS I. & II. *Motion written, and in terminis.*

Questions, with Answers exhibiting reasons.

Question I. Why nothing to be given as the act of the assembly that has not been put to the vote, and carried in the assembly?

Answer: This is only saying in other words that no act of the assembly shall be forged.

British practice. — From several orders of the House of Lords, made towards the beginning of the last century, it should seem, that about that period attempts to commit such forgeries had been made.* A counterfaction of this kind could not well have had for its author any other person than either the ministerial officer (the clerk) who has the penning of the journals, or the presiding officer (the Speaker), under whose authority and command the other acts.

The practice of the House of Commons furnishes two examples, and, as far as appears, but two, of an incongruity, the notice of which may serve by way of illustration to this rule.

One is that of a memorandum on the journals, that "the Speaker, by leave of the House, declared it to be their sense," so and so.† Was a motion in those words made, put to the vote, and carried? If not, no leave of the House was given, no sense of the House was taken: in the other supposition, the history given in this memorandum, which is a long and rather a perplexed one, was of no use. The usual introduction, the word *ordered*, or the word *resolved*, would have been a much more intelligible one, and just as proper in this case as in any other.

2. As to the other instance. At the commencement of every session, immediately upon the return of the Commons from the House of Lords, where they have been all hearing the king's speech in a place not big enough to hold a quarter of their number, before any other business is done, a bill, in pursuance of ancient orders, is read by the clerk, by direction of the Speaker, for form's sake.‡

"This custom," says Mr. Hatsell,‖ "I understand to be nothing more than a claim of right of the Commons, that they are at liberty to proceed in the first place, upon any thing they think material, without being limited to give a preference to the subjects contained in the king's speech." That such was the reason, may be, and upon the strength of such respectable authority, I suppose is, very true. But such a form is as absurd in itself as incompetent to the end. This thing called a *bill*, what title can it be said to have to that name? The clerk reads it, because the Speaker orders him: whence comes it? From the Lords? Not so: for as yet they have done nothing, any more than the Commons. From the Speaker? But he has no right to make so much as a motion for leave to bring in a bill, much less to bring in a bill without leave. A bill is a composition presented by some member: the thing here called a bill, is a child without a father, born, like Melchisedec, in the way of equivocal generation. The case seems to be, that at the time this order was established, no clear idea of the mode of generation of an act of the House seems to have been as yet formed. It was not as yet understood, that a composition, to be an act of the House — that is, of all, or a majority of the members — must, if it took its rise in the House, have begun by being the act of some one member. But to appear to be the act of some member, it must have been exhibited by him as such; and to make such exhibition, is to make a motion.

Years after this period, or these periods (take any of them) in the House of Lords, as we have just been seeing, things would be starting up, pretending to be acts of the House — orders, resolutions, rules — nobody knew how. There seems to be but too much ground for apprehending that this may still be liable to be the case in the French practice. But of this a little further on.

Make what one will of it, being no act of the House, it is no exertion of any right of the House: it answers not that purpose, any more than any other.

The right in question, so far from receiving any support from this futile form, neither requires nor admits of any support whatever. It exists of necessity in the first instance: it follows from the very constitution of that and every other political assembly. Nothing can be done — nothing can be expressed by the House, without being done, without being expressed, at some time or other, by some member of the House: expressed either *viva voce* or by writing, or in some other mode, no matter what — say, for instance, *viva voce*, by speaking. But when a man is up to speak, who shall say what it is he will speak, ab-

which I have ventured to recommend as a preferable one in a succeeding chapter, in which I propose an instantaneous mode of performing it: but the main point, as will be seen, is the putting a negative upon all fixed order; and in that respect both methods agree.

* Lords' Orders, Art. 45. Lords' Journals, 14th December 1621; 23d February 1623; 20th May 1626.

† Commons' Journals, 27th January 1697.

‡ Commons' Journals, 22d March 1603; 7th April 1614; 3d February 1620; 21st February 1623.

‖ Precedents of Proceedings in the House of Commons, with Observations, by John Hatsell, Esq., First Clerk of the House, 1785. Vol. I. p. 59.

straction made of any antecedent rule? He speaks not to the business offered to the House by the king, but to that or any other business, as he thinks fit. For the House therefore to be in possession of this right, there can need nothing but the non-existence of a rule to the contrary.

The futility of this form appeared on the same recent occasion on which the establishment of it was recognised. On the 15th of November 1763, before this pretended bill was read, Mr. Wilkes and Mr. George Grenville start up together — Mr. Wilkes, to tell his own story about a breach of privilege, and Mr. Grenville (then minister) with a message on the same subject from the king. Great debates which should be heard first — Mr. Wilkes's speech, Mr. Grenville's speech, or the bill: it was carried at last in favour of the bill.* What was got by this? The House had the pleasure of hearing this bill; and then there was the same matter to settle — who should be heard first, — Mr. Wilkes, or Mr. Grenville, as before.

Question II. Why in writing?

Answer: 1. Because it is only by writing that the tenor of any discourse can be fixed for any length of time.

2. It is only by such fixation that it can be ascertained that the draught exhibited is capable of standing as a resolution of the assembly, in the very words in which it is proposed.

Question III. Why put into writing by him who makes it, and not by any one else?

Answer: 1. Because no third person can so well tell what it is a man means as he himself can. If the words of it, as committed to writing, are chosen by anybody else, the utmost accuracy it can aspire to in the hands of such third person is, the being as exactly representative of the meaning of the avowed author of the motion, as if he himself had chosen them. But the chances are rather against its possessing that extreme degree of accuracy; and were they ever so much in favour of it, yet so long as there is the smallest chance on the other side, such chance will form a conclusive reason against the committing the business of penning the motion to anybody else.

2. To save time. Between the penner and the author, where they are different persons, a conversation of some sort must be carried on. This conversation may, and frequently must, occasion discussions and disputes. The sense of the author may be perverted by accident or design: or, where no such perversion takes place or was intended, it may be suspected. All this while, business must be at a stand, and the assembly sitting to no purpose.

Let it be of the mover's penning; and while he is about it, no part of the assembly's time is taken up. He may have penned it out of the house, and ought so to do (as will be seen farther on) whenever it can be done.

3. To promote maturity of composition. — If the author of a motion is permitted to rely on a third person for the penning of it, such permission will be liable to produce hasty indigested motions, the impropriety of which the author himself, had he been obliged to put them to writing, might have discovered. Writing summons up the attention to apply itself to the discourse written, and furnishes it with a fixed subject. Whoever, in any instance, has corrected what he had once written, may find, in that single instance, a reason fully sufficient to justify the establishment of this rule.

Question IV. Why in the very words in which, when made an act of the assembly, it is proposed to stand?

Answer: 1. Because no other terms can express, with the certainty of being accurate, the object which the author of the motion proposes to the House. The composition given as the act of the assembly, is not really its act, any otherwise than as far as it is the very composition which those, whose votes form the decision of the assembly, have given their votes in favour of. If the discourse they had voted for differs, in a single word for example, from the discourse exhibited by the author of the motion, then, as to such word, it is not of his penning; which, as has just been proved, it ought to be. The only discourse they can have meant to adopt, the only discourse they can all of them, and from the beginning, have had under view, is, to a word, the very discourse presented to them by the mover: if the resolution given in their name by any one else — the secretary, for instance, or the president — differs from that original in a single word, it is, *pro tanto*, a forgery.

I say, in a *single word:* for every one knows, that in a single word may be comprised the most important alterations: take, for instance, the word *not.*†

British practice. — In every art, the proper mode, how simple soever, and how incontestably soever, when once hit upon and clearly stated, it appears to be a proper one, and even the only proper one, is seldom the one pitched upon at first.

* II. Hatsell, 59.

† I lay out of consideration at present the case of an *amendment:* of which hereafter. If an amendment is proposed, it is by some other member, who has the same right to propose the alteration, as the author of the original motion had to propose such motion. The amendment being carried, the amended motion comes instead of the original motion; and the resolution passed by the assembly has two authors — two equally known and avowed authors, instead of one.

In the British House of Commons it was the ancient practice, we are informed by Mr. Hatsell,* "for the Speaker to collect the sense of the House from the debate, and from thence to form a question, on which to take the opinion of the House; but this," adds he, "has been long discontinued; and at present the usual, and *almost* universal method is, for the member who moves a question to put it into writing, and deliver it to the Speaker; who, when it has been seconded, proposes it to the House, and then the House are said to be in possession of the question."

From Lord Clarendon's account of his exploits in the character of chairman of a committee,† there appears some reason to suspect, that at that time the practice spoken of in the above passage still subsisted: otherwise it is not easy to conceive how that able statesman could have done so much mischief as he boasts of.

The way he took was, amongst other things, to report, which he says he frequently did, two or three votes directly contrary to each other. He must therefore have contributed, more or less, to the making of them so, or the "*entanglement*" he speaks of would not in any degree have been, what he boasts of its being, his work. Whatever had been their contrariety, had they been moved *in terminis*, and in writing, by their respective authors, it would not have been in his power to have had any share in it.

That such, at any rate, was the practice in the year 1620, two or three and twenty years before the period Lord Clarendon speaks of, appears from the Commons' journal of that year: in which, on an occasion where the Speaker's conduct had been the subject of animadversion, in the course of the debates, amongst other charges is that of a practice he was in, of "*intricating the question*," and another, of his having "*made many plausible motions abortive.*"‡

French Practice. — Provincial Assemblies. — What the practice has been in the French

* II. Hatsell, 81.

† History of the Rebellion, b. iii. vol. i. p. 275, 8vo edition, 1705.

‡ Commons Journals, 9th March 1620

Since this sheet was sent to the press, chance has led me to a passage in the journals of the House of Commons, by which it appears, that even so late as the year 1675 the identity of the terms of the act of the House with those of the motion was not invariably preserved. I will state it at length, the rather as, while it exemplifies the deviation from that rule, it may also serve to exemplify and demonstrate the ill consequences of such deviation.

The whole passage is as follows:—"A debate arising in the House touching the ancient order and course of the House in the method of raising supplies, and concerning the precedency of the lesser sum

"The House, upon the question, did resolve and declare it an ancient order of the House, That when there comes a question between the greater and lesser sum, or the longer or shorter time, the least sum and longest time ought first to be put to the question."

Upon the face of this passage two propositions may be laid down as undeniable:—

1*st*, That the words of it are not all of them the same, without any variation, as those employed by the author of the motion which gave birth to it.

2*dly*, That if in any part of it such identity was preserved, it is impossible to say how far such part extends, it being impossible to say where it begins.

The part that looks most like the authentic, and, if one may so say, the enactive part of it, is that which begins at these words: "*that when there comes a question between the greater and lesser sum . . . .*"

But this cannot be taken for the beginning of the authentic part, for two reasons:—

1. Because these words, in order to make up, along with the succeeding one, a sentence capable of officiating in the character of an act of the House, require to be preceded by the word *resolved*, or (to use the phraseology that comes nearest to that word in the passage in question) by the words *resolved and declared*. But in this passage no such word or words stand immediately precedent to the words in question: nor can any form of words capable of answering that purpose be found in it, without going farther back, and that so far as to involve some words which upon the face of them could not have been the words of the author of the motion, could not have been the words of the House.

To get the complement of words necessary to make out an intelligible proposition, the least remote ones one can begin with are the words, "The House upon the question did resolve and declare." But these, it is evident, could not have been the words of the House, nor words given by the author of the motion as designed to be adopted by the House. They are not words of an act of the House, but words used by a third person in speaking of an act of the House.

2. Another reason why the part beginning at the words, "*that when there comes a question*," cannot be taken as comprising all the words employed by the author of the motion, is, that between these words and the first words of the paragraph come others, the import of which forms an essential part of the import, whatever it be, of the act of the House; viz. those which speak of the antiquity of the regulation, the establishment of which was in view:—"*The House, upon the question, did resolve and declare it to be an ancient order of the House.*" These words, "*an ancient order*," we see, are in their import inseparably interwoven with the preceding ones, which we have seen must have been words, not of the House, not of the author of the motion, but of a third person, the penner of the journals.

So far as to the fact of the uncertainty: now as to the ill effects of it. They consist in this, that as you cannot tell what part of the passage, if any, was in the words of the act of the House, you cannot tell to what cases the act of the House meant to extend itself. This we shall see immediately.

The first paragraph, not amounting of itself to

assemblies of old standing, such as the Provincial States and the Chambers of Parliament,

an intelligible proposition—not amounting to a complete grammatical sentence, is inextricably interwoven with the second. They form two parts of the same sentence; and in both parts there is matter equally capable of being considered as representative of a part of the import of the act of the House. As you cannot tell where the language of the historiographer of the House ends, and where the language of the House itself begins,—it may be, that both paragraphs were expressive of the sense of the House; it may be, that only the latter was.

Now then comes the uncertainty and the mischief. The last paragraph gives the proposition generally, and without restriction: the former paragraph applies a restrictive clause. The last gives to understand, that in all cases where divers sums, meaning sums of money, are in question, it is the least sum that is to be put to the question first: the former paragraph contradicts this proposition in its character of an universal one, and says, that the only case to which this rule is to be deemed to extend, is that where the business upon the carpet is the business of supply — where the question is relative to "*the method of raising supplies.*" What is the consequence? That it is only in the case where the question is touching *the method of raising supplies*, that this passage in the journals affords any certain rule: and that, as to all other questions in which sums of money may be concerned, it not only affords no certainty, but presents a rule with which the certainty of any conclusion that can be formed relative to the subject is absolutely incompatible. The absence of all rule leaves the subject open to such other means of decision as the nature of it comports; but an ambiguous rule is mortal to all certainty while it lasts, and renders all true and regular decisions relative to that subject impossible.

Observe how subservient a rule, thus circumstanced, is to the purposes of disingenuous altercation.

A debate arises on a question not relating to supply. Does it suit your purpose to have the rule attach upon this question?—present the last paragraph alone. Does it suit your purpose to take the question out of the rule?—produce both paragraphs together.

Collateral considerations only make the confusion thicker: such lights as are to be collected from the situation of the legislators point one way; the interpretation given by subsequent practice points the other.

It is tolerably evident, that in the minds of the authors this rule had no other extent than what related to the single business of supply. Where money was concerned, the great object with them was how to keep their purses as close shut as possible against the swindler on the throne: it was no part of their purpose to sit down and frame a set of general principles, fit to enter into the composition of a regular code. How should it have been, when down to the present hour none of their successors have dared even to harbour any such ambitious thoughts?

Besides that, the rule is given as an ancient one; and the farther back we go in the history of the House of Commons (setting aside the period of its short-lived tyranny during the civil wars) the less we find them have to do with money for any other purpose than the simple one of affording a temporary relief to the necessities of the Crown.

does not appear, in a direct way, from any documents I have been able to meet with. The affectation of secresy, which, till the present auspicious period, has pervaded the whole system of French, as in general of monarchical government, keeps everything of this sort under a cloud.

But of the general practice and notions on this head, the regimen prescribed to, or imagined by, the lately instituted provincial assemblies, affords pretty good presumptive evidence: and that evidence shows the practice in this respect to have been pretty much on a par with the English, at the time spoken of by Lord Clarendon; that is, about a century and a half ago.

"The reports of the committees," says an author who has given us a general account of the constitution, discipline, and proceedings of these assemblies,* "the reports of the committees are made with a good deal of care. After having well settled the question, an account is given of the different opinions [*avis*;] of the effect produced by such and

On the other hand, subsequent practice is in favour of the more general construction: in a question noways relating to the business of affording supplies to the crown, we shall find, in a succeeding chapter, a curious instance: and such, for aught I know, may be the practice in every other instance. Here, then, to increase the confusion, we have precedent against reason; and all for want of the observance of a rule of composition so simple in its conception, and so easy in practice.

To exhibit what ought to have been done, as well as what ought not to have been done, I will now give the order in question as it ought to have stood, and as it would have stood had it been penned on the same plan with others that precede and follow it in the same volume, and even in the same leaf. The words in brackets express the dubious parts, the retention or omission of which will give the different constructions of which the passage, as it stands in the journals, is susceptible:—

The passage as it stands.	*The resolution as it ought to have been given in by the author of the motion, and entered by the clerk.*
A debate arising in the House touching the ancient order and course of the House in the method of raising supplies, and concerning the precedency of the lesser sum;	Resolved, [and it is hereby declared to be an ancient order of the House,] that when [in matter of supply] there comes a question between the greater and the lesser sum, or between the longer and the shorter time, the least sum and the longest time ought first to be put to the question.
The House upon the question did resolve and declare it an ancient order of the House, that when there comes a question between the greater and lesser sum, or the longer or shorter time, the least sum and longest time ought first to be put to the question.	

* Résultat des Assemblées Provinciales, p. 18.

such an opinion [*opinion;*] of the number of persons who concurred in it; of those who differed from it, and why; of the reasons [*motifs*] which occasioned each proposition to be adopted or rejected, in part or in the whole; in short, of the opinions [*avis*] which prevailed generally, *or* of that which was adopted."

"This method," adds the author, "ought always to be that of a committee. The assembly names them, not to pronounce a decision, but to elucidate an affair, and put the assembly in a way to judge."

This elaborate and *careful* plan, which, according to the author's notion, *ought to be the plan of every committee*, affords a pretty strong presumption, that in those assemblies (supposing this account to be a just one) the simple principle of giving a determinate existence in writing to every proposition, and so proceeding, either to receive that proposition (with or without amendments,) or to reject it, was not known. The resolutions of the meeting, to judge from this account, are jumbled with the minutes of the proceedings, and the accounts of the debates: in the conception of the author, they are unquestionably.

As this is a subject of the first importance to the precision of the proceedings in the great national assembly to which it is my ambition to be of use, to the genuineness as well as clearness of the results, and to the efficacious development of their powers, it may be worth while to give this account a pretty minute consideration, for the purpose of comparing the proceedings as here described, with the standard above laid down.

1. "*After having well settled the question* — [*Après avoir bien pose la question.*"] What question? The question, meaning the motion or proposition in question, if delivered in, in writing, by the author himself, can neither require to be settled, nor admit of it. It has settled itself. It may require amending indeed; but that is a very different operation from settling.

2. "After having well settled the question," *an account is given of the different opinions upon it* — [*on rend compte des différens avis.*] What are these opinions? — these *avis?* They are not decisions upon the question: they are not votes given towards forming such decision. Each question, when put upon a single motion, can admit of but one of two decisions — adoption, or rejection: each vote can admit of but one of three modifications — for the question, against the question, or neuter.* *Avis* is perhaps, here, put for *argument* — argument used in course of the debate.

3. "Account is given *of the effect which such or such an opinion produced* — [*de l'effet qu'a produit telle ou telle opinion :*"] — a further reason for supposing that *avis*, as well as *opinion*, here means argument. The effect that a decision produces, requires no account — no separate account: it produces the adoption of the resolution proposed, or the rejection of it: the resolution, if adopted, needs no account — it speaks for itself. It not only does not stand in need of any account — it admits of none: a composition given under that name, if it be in the same terms with those of the resolution, is not an *account* of that resolution, but the thing itself: if in different terms, then, so far as the difference extends, the account it gives is a false one.

A *vote*, if that were meant by *avis* and *opinion*, requires not, any more than the decision it has produced, or failed of producing, any *account:* it is given one way or the other, and the effect of it appears by the decision — by the adoption or rejection of the resolution proposed.

4. *Of the number of the persons that concurred in it* [in such opinion or argument] — *of those who differed from it, and why* — [de celles qui s'en sont éloignées, et pourquoi.] This *why*, this *pourquoi*, I must confess, I know not very well what to make of. I thought the *opinions* or *avis* had been themselves the *arguments*, and included the *reasons:* these *pourquois*, then, must have been the reasons of those reasons.

5. *Of the reasons* [motifs] *which occasioned a proposition to be adopted or rejected, in part or in the whole* — [des motifs qui ont fait adopter une proposition, en partie ou en total.]

The perplexity gets thicker and thicker: here we have not only reasons upon reasons, but reasons upon *them;* for *motifs* must surely here, as in French it does commonly, when spoken of with reference to an opinion, mean reasons — it cannot mean what in English we term *motives*. It can never have been meant, that, in these committees, the several members get up, and render an account of the motives that have given birth to their respective votes; saying, one of them, it was patriotism; another, it was the love of reputation; another, it was sympathy for the proposer; another, it was antipathy to the opposers; another, it was the hope of gaining a personal advantage by it that determined me: as little is it likely that the penner of the report should have taken upon himself thus to answer for each man's motives.

6. *Lastly, Of the opinions* [avis] *which prevailed generally;* or *of that which was adopted* — [enfin, des avis qui ont prévalu généralement, *ou* de celui qui a été adopté.]

This is still more perplexing than before. What means this opposition between *prevailing generally*, and *being adopted?* and how is it that the opinions which may prevail generally are *several*, while the opinion that can

* See Ch. XIV. *Of Voting*, p. 367.

be adopted is but *one?* If by *avis* is meant here *décisions* — decisions of adoption or rejection, on different questions you may have certainly as many decisions — in short, one or other of exactly twice as many decisions as there are questions. If by *avis* is meant here opinions given separately by the different members upon occasion of the same subject — discourses delivered, which if adopted by the assembly would have been so many *resolutions of opinion*, — these, if never put to the vote, are not acts of the meeting — acts of the body, but mere acts of the individuals. Yet after all, of this set of opinions there is (it seems, according to this author) one, and but one, which has been adopted. Has it, then, been adopted? It is then an act of the committee — a resolution of opinion passed by the committee. On the other hand, if only one of the set has been adopted, how is it that the rest, — which, since they are thus constructed with that one, must, it should seem, have been opposite and contrary to it, — can have been *generally received?* A proposition cannot be said to have been generally received by a meeting of any kind, if it has not been received by a majority: and if it has really been received by a majority, how can it fail of having been adopted? An account like this puts one in mind of the grammatical history of the cake: — G got it, and yet H had it.

Considering this confusion as the work of the anonymous author, it would not have been worth all this notice: but the practice, of which the *éloge* is thus given, must surely itself have been very confused, or it could scarcely have given birth to an account so perfectly confused.

Nothing like this is to be found in the reports of any English committee I ever met with or heard of. They do not report so much as their own *minutes;* much less do they report their own *debates:* no *opinion* is there given, which is not the opinion of the whole. Is a resolution of opinion proposed? If rejected, no traces of it appear; if adopted, it is given, not as the resolution of A or B, but as the resolution of the committee. Is a statement of any affair, or history of any transaction, given? One member, it is true, may have penned and proposed one part — another member another part; but neither the one part nor the other would have stood in the report, if they had not respectively been acceded to by a majority of the committee — if they had not, each of them, been the act of the whole.

Were a composition, like the one thus described, presented, under the name of the report of a committee, to a British House of Commons, what would they say? They would say, "This is no report; you must go back again, and make one." They would send it back to be *re-committed.* While A says one thing, and B, neither assenting to nor dissenting from what A has said, says another, this is no report of a committee: the report of a committee is what is said throughout by the major part of the committee, or by the whole.

But these, it may perhaps be observed, are but reports of *committees.* The committees, of which these are the reports, are very small assemblies, composed of a smaller number of members than what is commonly to be met with in the least numerous committees of a British House of Commons. The members may therefore be considered as acting in their individual capacity: and the reports, given under the name of such committees, may be considered as reports made by individuals. The reports of such committees as these may therefore be thus far informal, and yet the proceedings of the entire assemblies, to which these reports are made, be regular and exact.

Unfortunately, the account given in the same book of the method in which the decision of the assembly itself is formed (I should rather say, of the paper published as the decision of such assembly,) seems to indicate but too plainly, that the only simple and true method of forming such a decision is not less widely departed from in the one sort of meeting, than in the other.

"The opinion once formed by a plurality of voices (votes) [*voix,*]" says the author above quoted,* "then comes the time for entering it (writing it) [*l'écrire*] upon the minutes. But this operation (drawing up) [*rédaction*], *requiring a considerable time*, the assemblies name *committee-men* to perform it, and the meeting of the next day opens with the extract of the minutes of the day preceding. This regulation, highly beneficial as it is, *since it saves time*, may be productive however of a mischief."

If this account be just, it is impossible that the principle of the identity between the motion and the act of the assembly, should have been observed in these assemblies. For drawing up such act, no committee could have been either necessary, or of any use: no time could have been saved, but a great deal of time sadly wasted and consumed. The act, upon the only just and simple principle the nature of the case admits of, is already *drawn up* by him who moves it: to enter it upon the minutes is work — not for a committee, but for a copying clerk. Committee-men may be of use, to give a look occasionally to the journals, and see whether the secretary has done his business properly; that is, whether he has entered all the acts, and whether each of them be an exact copy of the original draught: but such occasional inspection is a very different thing from their doing of that business themselves.

* Résultat, p. 27.

The mischief here apprehended by the commentator is, that of the assemblies in general following, upon this occasion, the example which, in a passage which I have had occasion to quote elsewhere, he takes notice of as having been set by the provincial assembly of Tours. This assembly, it should seem, had conceived it proper to see what it was their committee-men had been making them say, and not to let the account thus given stand as definitive, till they, the assembly, had heard it read to them. The commentator, full of diffidence of the assembly itself, lest it should alter its own acts or pretended acts, is as full of confidence in their committee-men. It never occurs to him that, either through design or misconception, the latter can misrepresent, or upon just grounds be suspected of misrepresenting, an act which, under such circumstances it must be so difficult to represent at all, and which in truth can scarcely be said to have existence.

Turn to the journals of these assemblies, and, what is more, to the royal edicts published for the regulation of their discipline, and we shall find them confirm, in this respect, the account given of them by their commentator.

"In the case where divers opinions [*avis*] shall have manifested themselves, the assembly," says the royal edict for Haute Guyenne,* "*shall be obliged* to reduce them to two; and that which has the plurality of votes [*suffrages*] shall form the act of the assembly [*la délibération.*"]

What *must* be done, is done somehow or other, however badly: and therefore, an assembly ordered by royal authority to reduce its *avis* (whatever is meant by *avis*) to two, will contrive to do so. But upon the principle of the identity of the terms of the motion and those of the resolution — and supposing only one motion upon the carpet at a time — and supposing the votes to be given upon that one, no assembly could contrive to do otherwise. *For* or *against* the motion — the motion adopted or rejected — there is no other alternative.

The truth is, that these different *avis*, which the royal penman considers as liable to be produced upon a given subject—these *avis*, as far as they can be said to be anything, seem to have been so many different propositions — so many different motions, which were to be going on and debating at the same time. They are not votes at least; for votes [*suffrages*] it is understood, are to be given upon them. Taking them for motions, why the number of them should undergo this reduction, is not by any means made apparent. If all are consistent, why not let them all pass into resolutions, if the assembly choose it? If any are inconsistent with others that are preferred, the assembly, one should think, might be trusted to for not passing them: if a man has not sense to keep him from falling into inconsistencies, it is not a royal edict that will give it him.

The assembly accepts this regulation,† adding an amendment, palliating in some degree the inconvenience arising from a fixed order of speaking, as hinted at on a preceding occasion,‡ and more fully developed a little farther on.

The case which I should suppose the penner of this edict to have had in view, is that of a number of motions started at the same time, like candidates on an election. In the English practice this can create no confusion; for the one first started must be first disposed of; the question can only be as to the adoption or rejection of that one: the others come on afterwards, as they are moved. I do not say but that this method admits of improvement: hereafter, a regulation will be seen proposed with that view. But, what is the great point, it thoroughly prevents that confusion which on the French method seems to be inevitable.

I set out with observing, that to exhibit as the act of an assembly a proposition which has not been put to the vote, and carried by the majority of votes in that assembly, is to commit a forgery. If credit may be given to an anonymous, but very intelligent author,‖ this forgery is in France a matter of ordinary practice. It is where he has been speaking of the assembly of the States-General; and not only of that sovereign assembly, but of the particular preparatory assemblies collected for the purpose of sending deputies and instructions to that general one. Resolutions [*avis*] says he, are drawn up, frequently when nothing has been put to the vote. *On rédige les avis, et souvent on ne vote point.*

§ 4. — POINT III. *Unity of the subject of debate kept inviolate.*

Question, with Answers exhibiting reasons.

Why not suffer a second proposition to be started (except as excepted) till a former has been disposed of?

Answer: 1. That in the instance of such or such a particular proposition, the assembly may not, by *indecison* with respect to *that proposition*, be prevented from taking a course

* Art. 9, page 14, of the journal of 1779. This of Haute Guyenne is the second of the two original assemblies (Berri being the first,) the constitution of which was taken as a model for the others, since established all together in 1787.

† Procès-verbal de l'Assemblée de Haute Guyenne, 4to, 1779, p. 143.

‡ Chap. IV.

‖ Essai sur l'Histoire des Comices de Rome, des Etats-Généraux de la France, and du Parlement de l'Angleterre, 3 vols. 8vo. Philadelphie, (Paris) 1789, vol. ii. p. 195.

which, had its will been left free to exercise itself upon the subject, it would have taken.

This, we see, is what may be at any time the case, if a proposition, about which the assembly had begun to occupy itself, is thus permitted to be jostled, as it were, off the carpet, by another proposition different from the former, and incommensurable with it, before they are aware.

2. To prevent a degree of confusion, by which, for that time, the assembly may be deprived of the faculty of forming *any will* at all.

Without some such check, nothing is more likely to happen, even without design; and that in any assembly, much more in a new-formed and numerous one. And the endeavour to produce such an effect by design, is one of the most effectual plans that individual fraud or conspiracy can pursue. In this way a thousand propositions may be thrown out, which, had the assembly been left at liberty to occupy itself about them without interruption — in short, had it been left master of its own will, — must have passed.

A proposition (suppose) has been introduced: a debate arises, and in the course of the debate something is started, from which somebody catches, or pretends to catch, the idea of something else that would be very proper to be done. This something else happening to touch upon a more sensible fibre, the next speaker takes this for his theme. Affections grow warm, and crowding about this second subject, the first is insensibly departed from and forgotten. In the same manner, a third takes place of this second; and so on, till men's minds are effectually confused, and their whole stock of time and patience gone.

This divergency is what is the more liable to take place in any assembly, especially in any new-formed assembly, inasmuch as it is what scarce ever fails to take place in private circles. In this case, it is productive of no sort of harm: for amusement, which is here the end in view, is better provided for by rambling freely from subject to subject, than by adhering to any one. But in the case of a political assembly, it is productive of the utmost harm which such an assembly, as such, is capable of suffering.

The more eligible in its nature, and the more likely to have been embraced by the assembly, any of these propositions may be in themselves, the greater is the mischief that may result from such an irregular introduction of it. Introduced singly, each at its proper time, each one might have been carried: introduced, one upon the back of the other, each stands in the other's way — each throws another out, and a confusion is raised to which they all of them fall a sacrifice at once.

The enforcing this law of unity, and guarding it as well from intentional and insidious, as unintentional violations, is one of the uses that concur to evince the importance of keeping the composition, which is the subject of debate, exposed to the view of the whole assembly—But of this in another place.*

British practice. — As to this point, so far as concerns as well the negative put by the general proposition to the introduction of extraneous matter, as the choice of the exceptions, the British practice is exactly conformable to the regulation above proposed. But in respect of the details relative to the mode of conducting the several businesses which form the matter of those exceptions, it has been deemed open to improvement, in a variety of particulars which will present themselves as we advnce.

French practice. — Of the French practice relative to this point, some intimation has been given under the preceding head. What farther remains to be said of it, will more conveniently be referred to the next. The points themselves being so intimately connected, and the practice relative to each being a consequence of the same principle, it is next to impossible, upon any one of these topics, to avoid touching upon the rest.

§ 5. — POINT IV. *The process of debating distinct from, and prior to, that of voting.*

Question, with Answers exhibiting reasons.

Why not allow any vote to be given till the debate is finished?

Answer: 1. That the decision given may not prove an improper one, on the score of its having been built upon *insufficient* and partial *grounds*.

To *vote* for or against a motion, is to judge — to exercise the office of a judge: to *speak* for or against it, is to exercise the function of an advocate. To vote before any one else has spoken in the debate, is to judge altogether without documents — altogether without grounds: to vote while there still remains any one to speak, who has anything to say, is to judge without documents *pro tanto*. Is there any one member whose speech is to be looked upon as proper to be attended to in this view? — so, for the same reason, must that of every other: since, abstraction made of the differences in point of talent between individuals — differences of which no general rules can take cognizance, every man's speech presents just the same probability of affording useful lights, as that of every other.

2. That the decision given may not be exposed to the danger of proving an improper one, on the score of its being expressive of a will *different from the real* will of the majority of the assembly. Conceive a list of members, speaking in a fixed order, and each man

* See Chap. III. § 2, *Table of Motions*.

giving his vote, as his turn comes, at the end of his speech, or without making any speech, as he thinks fit. The first upon the list, after having said what he thinks proper, gives his vote; all the others, down to the last, give their votes on the same side. The last, when it comes to his turn, gives a contrary vote, grounded on arguments which had happened to escape all the preceding voters, but which, when once brought to light, stamp conviction on their minds. What is the consequence? A decision is given, purporting to want but one voice of being an unanimous one: but, in fact, contrary to the unanimous will of all the members whose decision it purports to be.

British practice. — In all political assemblies, the idea of which would be presented by that name to an Englishman unacquainted with, or not thinking of, the state of things in France, the British practice agrees perfectly with the recommendation given by this article — so perfectly, that it is to the rule itself that he would probably stand indebted for the first conception of its being possible to depart from it.

The mode of proceeding in courts of justice on this head, might indeed, if considered in this point of view, furnish an exception to this rule: but in this point of view an Englishman would not be apt to consider it, the business of a court of justice standing upon a footing altogether peculiar in this respect, as will be seen hereafter.

French practice. — The French practice relative to this important point, is so inextricably interwoven with the practice observed in the same country in relation to the other less important points, of which the enumeration has been already made, that to touch upon any one of them, without encroaching upon the rest, is scarcely possible.

The process of speaking seems scarcely to have been distinguished from that of voting, or the thing called a *speech* from the thing called a *vote*, even in idea; the same terms, *opinion* and *avis*, being employed, as we have seen, to denote, indiscriminately, the one or the other, or both together. Not being distinguished in name, they would remain undistinguished in exercise; and each man, in making his speech, whether it consisted of ten words, or the amount of twice as many pages, would of course give his vote at the same time; and that perhaps without suspecting that in so doing, he was doing two different things at once.

But, whatever each man chose to say, whether barely enough to give that signification of his will which a bare vote would give, or enough to make a speech of two or three hours in length, it happened to be so ordered, that each man should say it in a fixed order, as between man and man; such a member, if present, always speaking first — such another second — and so on. *Precedence* — that is, the order of sitting — was carefully settled upon such principles as were thought the proper ones in such case; and *pre-audience*, including speaking and voting — pre-audience, as a matter of inferior importance, was made dependent on precedence. From this combination — of confusion in what required order, and order in what required none, — results an effect which it is difficult to state with any degree of seriousness. The chance a man has of gaining partisans to his opinion is proportioned, not to the cogency of his arguments, but to the fancied height of the place in which he sits. Conceive this regimen adopted by the States-General, consisting (suppose) of 1100 members: he who sits first may hope to persuade 1099; the hopes of his next neighbour are confined to number 1098; and so down to the lowest, who sees nobody on whom his eloquence can make any effective impression but himself.

On the other hand, the chance a man has of forming a right opinion, is exactly in the inverse ratio of the chance he has of gaining partisans to that opinion. He who has it in his power to govern everybody, has it not in his power to receive lights from anybody; he into whose lap the collected wisdom of the whole assembly is poured in a full tide, sees no one to whom he can give the benefit of illumination but himself. If the ingenuity of government had employed itself in considering by what means wisdom might be most effectually disjoined from power, no other method equally happy can possibly have been devised.

One glance more at the regulations of the Provincial Assemblies: they will afford an instructive example or two, of ingenuity and observation struggling against precedent and prejudice.

First comes Haute Guyenne. Strangers to the principle of the identity of the motion and the resolution grounded upon it, they had found themselves entangled, in manner as above noted, with a multitude of *avis*, opinions — things that were neither motions nor speeches, nor votes — but something betwixt all three, springing out of one subject. The king's provisional code had ordered the reduction of these *avis* to two; *viz.* the two which after one round of *avis* had found the greatest number of voices in its favour. The consideration of this article had suggested to the Guyenne committee an imperfect view of the inconvenience of this orderly method of proceeding: the *avis* of a member low in the scale of *opinans*, though it was *possible* it might be the better of the two, could not possibly have so many *suffrages* in its favour as that of a member higher in the scale might acquire. The remedy hit upon was — not to

keep the processes of debating and voting separate—that was a step too wide from precedent and establishment to be thought of, —but to have two rounds of *avis*.* Then (say the committee,) a man who upon the first round has heard the *avis* given subsequently to his own, with the reasons that may have been produced in favour of them, *may*, upon the second turn, sacrifice his own to that of somebody else. That he *may*, is not to be disputed: but will he? Unfortunately, it is not quite so easy to human pride to adopt a right opinion after having avowed its opposite as before: and, if such be the case between equals, how must it be where the conversion cannot take place without mortifying the pride of rank, as well as the pride of wisdom?

This step towards reason was thought, it should seem, too bold. Seven years after this period, the Assembly of Orléans, though willing to do something, had not resolution, however, to venture quite so far.† It was settled, that "for ordinary business there should be but one round of *opinions*, in which a man should be allowed to develope his *avis;* but that in matters that appeared to require discussion, the president, in conjunction with the first *opinans* of each order,‡ should judge whether the matter subjected to *délibération* required two rounds of *opinions*, and that this decision should precede the *délibération*."‖

One assembly there is, in which the process of debating; and that of giving the opinions, are distinguished and kept separate; and this is that of Picardy.§ The province nearest to England has, on this important point, come over to the English practice.¶ This coincidence, however, can scarcely be reckoned other than fortuitous; it goes no farther: these *opinions* are the same indeterminate sort of thing, or nearly so, here as elsewhere: they are not mere speeches indeed, but they are something betwixt motions and votes; they are sorts of things of which an indefinite multitude are liable to start up, and which, in Picardy as in Haute Guyenne, require force to reduce the number of them to two.*

To wean a man completely from an error from which the chains of habit have rendered it difficult for him to break loose, no recipe is so effectual as the indication of its source. In the present instance, the cause of this entanglement of two processes, which in point of utility it is so necessary to keep distinct, may be traced pretty successfully in two circumstances. The one, which however may be looked upon as rather the effect than the cause, is the confusion of ideas indicated by the equivocal nomenclature already noticed: the other is the junction of the two processes in the practice of courts of justice, in which, as we shall presently observe, such a junction stands upon a very different ground, and is in some cases not productive of any inconvenience, and in none, of any degree of inconvenience approaching to that of which it is productive in the case of a political assembly of any other kind.

While no difference was as yet descried between *original motion*, *motion in amendment*, *argument*, and *vote;*—while men were as yet to learn how necessary the concurrence of all these objects is to the formation of a rational decision—how distinct they are in themselves, and how important it is to keep them so;—when the art of applying a correction to the original proposition, in such manner as to enable the assembly to choose between the proposition uncorrected and that which would be the result of the correction, was as yet unknown;—when, on offering a fresh proposition in the course of a debate, a man had not yet learnt so much as to ask himself what influence it would have, or what he meant it should have, on the fate of another that was already on the carpet;—what occasion, what warning, what motive should men have had for separating—in short, in this state of the progress of intelligence, what possibility of separating—argument from vote,—and that so perfectly as that all the arguments should be exhibited at one time, and all the votes at another? In common discourse, though the distinction equally exists, no such separation usually takes place; and common discourse is not only the natural, but, till some particular reason presents itself to the contrary, the proper model for regular debate.

* Haute Guyenne, I. 143; anno 1780.

† Orléans, page 168; anno 1787.

‡ By the first *opinans* of each order, I suppose was meant the first *parcel of opinans:* if so, pity but it had been expressed so.

N. B. The whole number of *opinans* stands, under this code of regulations, divided into parcels, four in a parcel, viz. one of each of the privileged orders, and two of the third estate. Of this see more under the next head.

‖ What is meant by the word *délibération* here—whether the *arrêté*—the act or resolution of assembly, which in the French nomenclature is frequently termed *délibération*—or the assemblage of acts whereby these *avis* are respectively exhibited by the individual members—is more than I can take upon me to say: I give the passage as I find it. The same confusion pervades the Berri code; which has served as a sort of model to the rest, and which, in this respect, has been but too faithfully copied.

§ Picardie, p. 184, 13 Décembre 1787; Règlement II. art. 5 and 6.

¶ .... Apres la proposition chacun pourra, à son tour, faire telles observations qu'il jugera convenables; ....

La discussion de la proposition préalablement faite, ... l'on ira aux opinions.

* Picardie, Reglement II. art. 10.

All objects present themselves at first appearance in the lump; discrimination and separate nomenclature are the tardy fruit of reflection and experience. In Europe, a dog and a horse are become different animals; at Otaheite, the first horse was a great dog.

Not only in the unfettered intercourse of common conversation is this separation neglected, but the case is the same in the regulated practice of the species of political assemblies instituted for the purposes of justice. This practice is the model which the legislators of the modern provincial assemblies, and before them those of the ancient provincial states, would naturally have before their eyes; it is from this source that the spirit of their laws would naturally be drawn.

The mode of proceding in the States-General, which ought naturally to have been the model for popular or pretended-popular assemblies, was too unsettled to serve as a model for anything, even for itself.

Courts of justice must have existed at all times, and everywhere; and everywhere and at all times, the members of them must have delivered arguments, and given votes.

That the regulations given provisionally to the provincial assemblies by royal authority, or those settled by the assemblies, had lawyers for their authors, we are nowhere told, as it is not natural that we should be. That matters of law should be given to a lawyer to draw up, is however nothing more than natural: but to a lawyer, the model of perfection is naturally the practice of his court.

That such should have been the regimen pursued by judges in courts of justice, is not to be wondered at: nor, in courts of justice, where the number of the judges is very small, and which confine their transactions to the business of administering justice, is it to be blamed. The principal courts of justice in France, the courts of parliament, though always abundantly too numerous for courts of justice, were at their first institution less so than at present: and it was at that early period that their practice in this particular must necessarily have been settled.

These judicial assemblies, and the sort of administrative bodies formed by the provincial assemblies, were so far analogous, that both sorts were assemblies of a political nature — both had propositions to decide upon, resolutions to form, and votes to give. But there is one point in which the analogy totally fails; and this point, obvious as it appears when once started, seems totally to have escaped the observation of the man of law. In judicial assemblies, in as far as they act judicially, no resolution comes to be formed, no vote comes to be given — not even that of him who stands foremost upon the list, till after the question has undergone a full and elaborate discussion by advocates on both sides. But in political assemblies, in the narrower sense of the word, in assemblies legislative, administrative, or merely popular, there is no such distinct class of persons; at least none such has, anywhere that I recollect, made its appearance hitherto separate from the rest. In assemblies of these latter descriptions, each member unites in his single person the distinct, and in a certain sense opposite, characters of advocate and judge. By his vote he exercises the latter function; by the part he takes in the debate — by his speech, in a word — and in the case of the author of a motion, by the making of that motion — he exercises the former.

He who, standing first upon the list of speakers, gives his vote at the conclusion of his speech without hearing any of the others, acts exactly as a presiding judge would do, who should begin with giving an opinion in favour of the plaintiff or of the defendant, without hearing a syllable from the parties or their advocates on either side. I mistake; he acts still worse: he decides not *ignorantly*, without hearing anything from anybody; but *partially*, after hearing only on one side. A proposition of some sort or other is upon the carpet; it must have had somebody for its introducer: this introducer has been heard in favour of it; it is therefore upon this partial representation only that the vote of the member who stands first upon the list, must under this regimen be formed.

In the judiciary line, the French and British practice on this head are similar in appearance, without being so in effect. In both instances, each man's vote, it is true, follows immediately upon his speech; but in the British practice this usage is attended with no inconvenience: the senior judge, from being the first to speak and to give his vote, loses nothing in point of intelligence; the junior judge, from being the last, loses nothing in point of influence. Why? Because the speeches they make in public — the speeches they are *heard* to make, are not the speeches by which their judgments have been determined: in a word, their speeches are not debates. What debates may happen to take place among them, are always private; they are carried on in whispers, or out of court among themselves. Before any one begins to speak, every one of them knows the mind of every other: their speeches, accordingly, are addressed, not to one another, but to the parties and the audience. Their object in making these speeches is not to make proselytes of one another: that object is either already compassed, or recognised to be unattainable. Their object, if unanimous, is to instruct the audience, and plead, each man, in favour of the whole number; if there be a difference of opinion (an incident, in South Britain at

least, very rare) to defend and justify at the bar of the public, each man his own side.

How happens this? Because the smallness of their number renders this kind of concert practicable. In England, in ordinary cases, the number is not more than four; they sit close together: the whisper of a moment is sufficient to inform them whether the opinion of the three junior judges coincides with that of the chief; if it does not, an adjournment of the cause, to give them an opportunity of debating the matter over in private, is the constant consequence.

When the whole twelve form themselves into one court — an incident that does not take place perhaps so often as four times in a twelvemonth — the small increase in number resulting from the junction makes, in this respect, no difference: here, as in the other case, the public declaration of opinions is constantly preceded by private conference.

In the court of justice composed by the House of Lords, the numbers, and other circumstances, being so widely different, the practice is accordingly different. The number who have a right to be present is very large; the number actually present is liable to prodigious fluctuation. The members of this large body are not collected together in one place — are not in the constant habit of living with one another, as are the members of that small brotherhood. Among the Lords there can be no general conference but in a formal debate: accordingly, among them the process of debating is as distinct from that of voting, when they act in their judicial capacity, as when they act in their legislative.

The French parliaments — at least the principal body of that denomination, the parliament of Paris — bear, in relation to the points in question, a much greater resemblance to the House of Lords than to the ordinary courts of justice in Great Britain, and particularly in England. The number commonly present in the House of Lords is scarcely equal to the number commonly present in the parliament of Paris, when all the chambers are assembled. When that body, stepping aside out of the track of justice, takes cognizance of business appertaining to the departments of legislation and administration, its numbers, instead of being less than on the other occasions, are commonly greater; both by the extraordinary affluence drawn by the importance of the business, and by the addition of the peers, whose presence on such great occasions is commonly requested. Yet in no instance, as far as I have been able to learn, does this assembly ever depart from the judiciary usage of confounding the two processes of debating and voting, in manner above mentioned.

§ 6.—POINT V. *In debating, no fixed order of pre-audience.*

Question, with Answers exhibiting reasons.

Why not admit of any fixed order of pre-audience in debate?

Answer: 1. Because a fixed order is unfavourable to the growth of that intelligence on which rectitude of decision in great measure depends; to wit, in as far as intelligence is the fruit of industry, excited by emulation.

A man who finds himself low upon the list, may, in ordinary cases, naturally expect to find his arguments forestalled; and the lower he is, the less will it appear to be worth his while to be at the pains of studying the subject, for so small a chance of distinguishing himself, or being of use. Should superior ability or perseverance now and then get the better of this obstacle, still it is an inconvenience in itself, and a disheartening circumstance to reflect on, that his arguments cannot be produced till after the attention of the hearers may have been exhausted, and their appetite palled.

In this line, as in every other, the less a man's faculties seem likely to be worth, either to himself or others, the less labour will be bestowed in cultivating them.

2. It tends to waste time by increasing the quantity of useless discourse.

What is lost in point of intelligence, may be made up in words. A man who stands high upon the list, standing in that conspicuous station, and finding himself perpetually called upon to speak, may fancy himself bound, as it were, to obey the summons, and speak at any rate, as it were in his own defence. Something he must every now and then say, to the purpose or not to the purpose, willing or unwilling, prepared or unprepared. — "For so many days together, nothing but a silent vote? This will never do: I must make something of a speech to-day, or people will begin to look upon me as nobody."

Thus, while the able and willing are shoved out of the list of speakers with one hand, the ill-qualified and unwilling are dragged into it with the other.

3. It tends to diminish the measure of intelligence imparted to the assembly, and thence to diminish the chance in favour of rectitude of decision, in another way; viz. by preventing that concert between persons possessed of different talents — that casting of the different parts, which may be so necessary to the displaying of the strength of the cause on every side to the best advantage.

One man, for instance, shall be fittest for the business of statement and narration:

Another man, who is capable of urging this or that argument with a superior degree of force, shall be unable to grasp the whole *compages* of the business:

A third, who can begin nothing of himself, shall be excellent at improving a hint by another, or correcting an error, or supplying a deficiency:

A fourth, though sparingly endued with the power of invention, shall be good at summing the arguments offered by others, and putting each argument in its proper place.

A fixed order, with its blind inflexibility, shall chop and change all these parts, turn topsy-turvy the order designed by reason and by nature: the reasoner shall stand before the narrator, and the recapitulator before both.

Setting aside the case of previous concert, and supposing the order to be fixed anyhow, some error may be advanced by a man — say in matter of fact, say in matter of argument, which, as it happens, somebody of those who spoke before him is in a condition to correct, but no one of those who are to speak after him. What follows? That if the rule of fixed pre-audience be observed, the error must pass uncorrected, and be received for truth. So often as this happens to be the case — and there is no occasion on which it may not happen — truth and this rule are incompatible.

4. It tends to strengthen whatever hold might be obtainable by seductive influence; and thereby to throw discouragement in the way of sincerity and truth.

Every man having to say something in his turn, and to show the side he takes, by his vote at least, if not by a longer speech, those who stand lowest upon the list will be obliged, whether they will or no, to see, and it will be known that they see, the part that is taken by every man who stands above them. But of this more fully under the next head.

5. Considered in respect to its influence on the rights of individuals, it puts all the members upon an equal footing: and on this head at least, equality is justice. Whatever be the advantage of speaking before or after another man, no reason can be given why one member should enjoy it in preference to another: the consequence is, they ought all to have an equal chance for it.

In point of real importance, this last consideration rank at a great distance behind the preceding ones. In those cases it is the interest of millions that is concerned: in this, it is the interest of units. But even this ought not to pass unnoticed; for millions are composed of units. And in the present instance, it is the interest of the units that is the most palpable, and the most immediately at stake.

British practice. — The order in which members speak, is that in which they happen to present themselves for that purpose;* which they do by rising from their seats.† In case of doubt which person, out of a number, was up at first, it is the province of the Speaker to decide;‡ that is to say, provisionally; for ultimately nothing can be decided but by the House.‡ Upon each occasion, the race, if so one may term it, is renewed; by starting up second, on any occasion, a man does not acquire the right of being heard first upon a succeeding one.

This mode is liable to inconveniences, which a person not rendered insensible to them by habit, will not find it difficult to divine; and which will be considered, and a remedy endeavoured to be found for them, farther on. But these inconveniences are nothing in comparison of the advantage gained by the avoidance of those which, we have seen, are the inevitable result of every kind of fixed order whatever.

In the British practice, the fundamental principle is equality: and here, in prescribing equality, public utility concurs, as we have seen, with justice. In the particular course taken to enforce and apply the principle, injustice, or at least the danger or appearance of it, as we shall see hereafter, have insinuated themselves. But under the greatest practicable degree of injustice, its efficacy on this head can never fail of meeting with a powerful controul in the influence of chance — that incorruptible power, which in this, as in so many other instances, is the best guardian and firmest protector that equality can have. At the worst, it is but occasional injustice; and between occasional and constant injustice there is no comparison.

French practice. — In the English practice we have seen disorder at the surface — utility and justice at the bottom. In the French, we shall see order at the surface — inconvenience and injustice underneath: the private injustice palliated, or rather modified in different ways; but the public inconvenience remaining unaltered, and in full force.

In the code of regulations adopted by the first of the two pattern-assemblies, the provincial assembly of Berri, the following is the course laid down. The ecclesiastical members are to *sit* and *speak* in the order of their nomination to their respective benefices:‖ the noblesse, in the order of their age:§ the third estate, according to an order which it is declared shall be fixed as between the districts which they represent.¶ The monster equality being thus, by different processes, extirpated from the three different classes of citizens, order — good order, *bon ordre*, as doubtless it appeared — was established, and the duty of the legislator done.

The clergy, it is to be observed, stand first

* H. Hatsell. Commons' Journals, 2d May 1604.

† Ibid. 76.

‡ Ibid. 76. Commons' Journals, 24 May 1604.

‖ Part i. Vol. I. anno 1778. Reglement pour la Convocation et la Formation de l'Assemblée Sect. II. art. 5. p. 35.

§ Ibid. III. 7, p. 37. ¶ Ibid. IV. 13, p. 40.

in dignity; after them the noblesse; the third estate in the rear. Accordingly, the clergy are placed all together at the right of the president; the noblesse on his left; and the third estate, below them on each side.* The important article of sitting being thus adjusted upon strict constitutional principles, the inferior businesses of speaking and voting admitted of a temperament. Accordingly, for the purpose of *opining*, the whole assembly, consisting, when full, of forty-eight members (exclusive of the two procureur-syndics,) is considered as distributed into parcels: twelve parcels, four in each parcel; the four consisting of an ecclesiastic, a noble, and two of the third estate. He who sits uppermost of the ecclesiastics is thus joined with him who sits uppermost of the noblesse, and with the two who sit uppermost of the third estate; and so downwards throughout the list.

If, by this expedient, the individuals concerned were satisfied, that was one great point gained. What was gained in the other points?

1. Nothing in point of emulation.

2. Nothing in point of saving time and words.

3. Nothing as to the convenience of casting the parts, or correcting mistakes.

4. A small matter as to the diminution of undue influence. This influence, as between men of different classes, is reduced in some degree: but the influence of man on man, in the same class, is left untouched.†

5. Nothing in the article of equality. Where all have a right to be upon an equal footing, every scheme of preference is equally unjust.

In the second of these two original assemblies, that of Haute Guyenne, a fixed order is settled upon the same principles, with some little variation as to the details:* and, as a fruit of the experience gained in the two years that had elapsed between the institution of the two assemblies, and as a means of providing the more effectually against any violations of this good order, it is provided, in terms more positive than those employed in the Berri code, that no member shall give his *avis* till called upon by the secretary for that purpose.† The end in view was, I suppose, to prevent interruption: but the means employed are such as render the exercise of every member's right dependent upon their servant's pleasure.‡

In the Assembly of the Notables of 1787, another course was prescribed by royal mandate. The voices ["*voix*"]‖ were here to be taken, not in the order of sitting, which we may be sure was the order of dignity, but in the reverse of that order. This course was directed to be observed as well in full assembly, as in the seven committees into which the assembly was immediately broken down.§

* Berri, Vol. I. anno 1778, 10. p. 31.

† The small utility of the arrangement in this point of view, is more particularly observable in the instance of the ecclesiastical order; in which inequality of dignity is liable to be connected with subordination in point of power. When a bishop, for example, and a number of his diocesans, sit in the same assembly — a case exemplified, perhaps, in every one of these assemblies — none of these subordinates can open his mouth, till after the superior has declared his pleasure. If an historiographer of these assemblies is to be believed,[a] a bishop, in one of them, was explicit enough to declare, that an ecclesiastic ought always to be of the same opinion with his bishop. Admit this proposition, and a good deal of time might be saved from consumption, as well as a good deal of truth from violation. The multitude of the members, one of the most formidable rocks which the institution of the States-General is exposed to split upon, might be most happily reduced by giving, to every bishop chosen, the proxies of as many of his suffragans as are returned with him. I mention this only in the way of illustration, not as affording a specimen of a mode of thinking which can possibly be a general one. The anecdote, probably heightened, or grounded upon some hasty expression, would not have been given by the author from whom I take it, but for its singularity. It would be injustice to the nation, as well as to the order, to view it in any other light.

[a] *Résultat des Assemblées Provinciales*, 8vo. 1788, p. 25.

* Haute Guyenne, page 119; anno 1780, Sect. I, art. 15.

† Ibid. Art. 21, page 121.

‡ Wherever the exercise of a right is deemed invalid till after some act has been performed by a particular individual, that individual, however insignificant in other respects, possesses thereby a negative upon the exercise of that right: and though he might not venture to exercise such a negative upon his own bottom, he might, when supported by a faction.

It was thus the French parliaments, and particularly that of Paris, from having in their custody the registers on which new laws were to be entered, acquired very happily a sort of negative in legislation. It is to some such circumstance, little heeded at its commencement, that arbitrary power owes in many instances its only checks. But in the same way may liberty be checked and fettered by arbitrary power.

‖ What do *voices* ["*voix*"] mean here? Speeches only, or votes only, or both together? The royal mandate does not say, and a stranger may be permitted not to know. In practice, I am inclined to think it was construed to mean votes, or at least the short and summary *opinions* given instead of votes. A debate must have preceded, if what I understand from good authority be true; and that carried on in a mode not only as irregular as the English, but rather more so. Half-a-dozen voices at a time, I am assured, was no uncommon concert; so natural is the connexion between bad government and anarchy.

To this arrangement the dignity of rank found, one may suppose, no great difficulty in reconciling itself. Montesquieu's story of the Spaniard and the Portuguese would naturally come to mind:— "*No matter what the place, so it distinguishes me from you.*"

§ Proces-Verbal, p. 78, in 8vo. Paris 1788.

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This plan, with all its impropriety, was no inconsiderable improvement. It was the least bad of all fixed orders that could be devised.* The influence of will on will is thus reduced to its *minimum;* as far as the quantum of influence is to be measured by the degree of dignity. Other advantages might be pointed out, were it worth while to spend words in measuring shades of inexpediency, with perfect expediency in full view.

§ 7.—POINT VI. *Simultaneity of the Votes.*

Question, with Answers exhibiting reasons.

Why require the votes to be given all at once, rather than one after another, according to a predetermined order?

Answer: 1. To save time—of which, in a numerous assembly, the taking the votes one after another, though it were in the most expeditious mode possible, must occasion an enormous waste.

Imagine the States-General of France voting, in the order of regular succession, upon every motion, how much soever in course; and contrast this process with that observed in the British House of Commons, open, as I conceive it will be found to be, to further improvements. In the House of Commons, when there is no division, as is the case with perhaps ninety-nine motions out of a hundred, the business of taking the votes is the affair of two instants: one, in which the affirmative votes—the other, in which the negative votes, are called for. In the States-General of France, under the regimen supposed, that same business would be the affair of about eleven hundred such instants: that is, about five hundred times as much time would be consumed in the latter case as in the former. One might even say more: for when eleven hundred votes are given one after another, accounts must be taken, whatever be the eventual disparity, and a deal of time consumed, in taking care not to omit any man, nor count the same man more than once.

2. To lessen the efficacy of undue influence.

I say only to lessen it; for if two men are absolutely and *bonâ fide* agreed to play the parts of master and slave, or pope and devotee, what possible means will there be of hindering them? Neither the process of crying *Aye* or *No*, nor that of holding up hands, can be rendered so exactly simultaneous, but that, if the slave is *bonâ fide* upon the watch, he may wait to observe the part taken by the master's voice or hand, so that his may take the same. But to the slave who feels an inward disposition to rebel, the practice of simultaneity may upon occasion furnish excuses that may stand a better or worse chance of being accepted:—"I beg a thousand pardons: I took another man's hand for your's." "If I have acted honestly for this once, it was through mistake: the matter appeared unfortunately so clear to me, that I made no doubt of finding your hand on the same side."

Wherever a loop-hole offers itself at which probity may make its escape from the trammels of seductive influence, it is plain that too much care cannot be taken to leave it open. See the section on the cases where the secret mode of taking the votes is the proper one, viz. Chap. XIV. § 2.

The concealment thus recommended is not that which forms the inconvenience, where there is any, resulting from the secret mode of voting. It is only the will of the seducer that is concealed, for the moment, from the knowledge of the voter—not the conduct of the voter that is concealed, at the long run, from the knowledge of the public.

The result of a decision given in this summary way may, it is true, come to be done away by another decision, given on the same question, in the exact and regular mode: but this latter opposes, or at least may be made to oppose, to improbity, other checks which are peculiar to itself: of which in another place.†

British practice.—The mode of voting pursued in the British practice accords thus far with the recommendation given by this theory. In the summary way, the voices given on each side are all lifted up promiscuously, and at the same instant. In the regular mode, on a division, all the feet move promiscuously, and as fast as they can. A division is not conceived to be either a procession or a dance.

In both cases, the practice is not free from particular inconveniences, which will be represented, and remedies proposed for them, in another place. In both cases, the outlines might be better filled up than they are; but the outlines themselves are just.

In point of diminution of undue influence, the advantage gained is perhaps no great matter. It is out of the question altogether in the regular mode, where the part taken by everybody being deliberate and conspicuous, must be observed by everybody: and in the summary mode, it cannot be expected to amount to much on those great questions of national importance, where party puts its shoulders to the task, and the part to be taken in the House is previously settled by most of the members at private or less public meetings.

* It puts one in mind of Solon legislating for the Athenians, and giving them—not good laws, but the best they could be brought to bear. But since that day, national wisdom among our Athenians has made an immense shoot; and they are become ripe for good laws, if ever a people were.

† See Chapter II. *On Publicity with regard to the proceedings of a political assembly.*

But still there are not wanting a multitude of occasions on which, under favour of this part of the discipline, probity may make its escape from undue influence. Let the advantage gained in this way amount to ever so little, it is so much got out of the fire.

French practice. — In the French practice, the speeches, where a man has anything to say, are made in a predetermined order, as we have seen; and as each man's vote comes immediately after, or instead of—in short, is confounded with — his speech, — hence vote follows after vote, as speech does after speech.

Speaking with an eye to the States-General, I have brought to view the enormous quantity of time which, upon this plan of regular succession, the mere operation of *voting* must of itself, in an assembly so numerous, unavoidably consume; but when to this one adds the process of *debating*, and the multitude of speeches which, in an assembly of eleven hundred persons, all picked men, selected for their talents by and out of four and twenty millions of people, may be extorted in a manner by the considerations above mentioned, the imagination starts at the idea.

In a company like the provincial assemblies, consisting of no more than eight and forty persons, this inconvenience might chance well enough not to rise to such a magnitude as to attract notice. But even in an assembly like that of the Notables of 1787, consisting of one hundred and forty-four, it seems already to have been apprehended. For this consideration must, at least, have been among the number of those, in virtue of which such haste was made to break down that assembly into seven committees of twenty or twenty-two each, as soon as formed. In the course of sixty-two days the *plenum* sat but six times: and on none of those days do the transactions, as represented by the *Procès-verbal*, seem to leave any room for a debate. In full assembly, nothing seems to have been done but hearing papers read, and speeches of ceremony pronounced.

Even in the provincial assemblies, consisting of but forty-eight members, it seems to have been a principle, to do the business as much as possible in committees, consisting of no more than a dozen members. In some of them, according to their historiographer,* a regulation is established, not to take into consideration any business in full assembly, that has not, in its passage from the committee in which it originated, gone through the other three. This he looks upon as "necessary, in order to avoid as much as possible the noise and bustle to which debates carried on in numerous assemblies are exposed."*

These observations, and many others that might be added, seem to bespeak a general apprehension of the impossibility of carrying on business in the French mode in *numerous* assemblies; that is, not only in such as would be esteemed numerous in England, but in assemblies, for example, consisting of half a hundred, or even so few as a quarter of a hundred persons. How must it fare then with the States-General, and its eleven hundred members? Is it to have no general will? Is it, like the first assembly of the Notables, to sit for no other purpose than to hear papers which would have been better read than heard, and speeches which might as well have been neither read nor heard?

Is no business to originate there? — nothing to be done but to pronounce definitively, and *in globo*, upon some voluminous draught transmitted from some small and select committee? It is a fallacy, then, to speak of its having a will of its own — it is a fallacy to speak of it as possessing the power of the people. The real possessors of the power of the people are the members of this oligarchy, the select committee. But of this more fully in another place.

Observations. — The circumstance that served us to account for the usage relative to the fourth point, will afford us a means equally natural of accounting for the practice relative to the present head.

Between the practices of speaking in succession, voting in succession, and confounding speech with vote, the connexion is not, it is true, a necessary one. Speeches *might* be made in turn, and yet votes given all at once. Speeches might be made in the order in which persons happened to rise to speak, or in any other uncertain order, while votes were given in a fixed order.

But the connexion, though not necessary, was natural. Why? Because it was natural that judicial assemblies should have served as a model: and in judicial assemblies it was as natural that the judges should speak in a fixed order, determined by the joint influence of rank and seniority, as that each man should speak and vote at the same time.

It was a natural course, which, as far as judicial practice is concerned, is sufficient here: whether, in the instance of that practice it be of all others the most expedient, is a question that belongs not to the present purpose.

CHAPTER VII.

OF THE PROPOSAL OF MEASURES FOR ADOPTION.

THERE ought to be in every assembly one individual officially charged with the *initiative*, that is bound to commence the operations, and to propose the necessary measures. For if no member in particular ought to have a

* Résultats des Assemb. Prov. p. 18.

plan respecting the business to be considered, it may happen that there will be no plan, and that the assembly will remain in a state of inaction.

It is not only necessary that there should be a plan upon each occasion, but there ought to be a train—a connexion, between the projects submitted. It is not enough to provide for the first sitting: there ought to be a general plan, embracing all the requisite operations, disposing them in the best order, and leading them onward to their conclusion.

This *obligatory initiative* naturally belongs to those who convoke a political assembly, and who are best acquainted with the wants of the state. The general distribution of labour is the duty of the administration: the ministers should propose — the assembly deliberate and resolve.

But the *right* of initiation ought not to be the privilege of the executive exclusively: — each member ought equally to possess it. There are three principal grounds for this arrangement:—

1. That the intelligence of the whole assembly may be improved for the general good.

There is as good a chance for obtaining the best advice from one party as from the other. To limit the right of proposing, is to renounce everything which might be expected from those who are excluded: it is to institute a monopoly mischievous in every respect, both because it extinguishes the emulation of those whom it reduces to merely a negative part, and because it may retain the greatest talents in a state of inaction. The most intelligent and clever men may, under this exclusive system, be enchained by those who are greatly their inferiors in genius and knowledge.

2. That abuses may reformed. If the right of proposing belong only to the administration, those abuses which are favourable to it would be perpetual: the assembly would have no direct method of causing them to cease. This arrangement would give to the government a most commodious species of negative as against all measures which were unpleasant to it — a negative without noise and without debate.*

3. That the danger arising from the negative right, when it exists alone, may be prevented. The assembly which should possess the power of rejecting alone, would be tempted to abuse it; that is to say, to reject good measures, either from a feeling of pride, that it might show that it was not a mere nullity, that it might exercise its authority, or that it might constrain the hand of government, and lead it to concede one point that it may obtain another: for the right of refusal may be converted into an instrument of offence, and may be employed as a positive means of constraint. Such a system, instead therefore of producing harmony, would tend to produce discord by creating a necessity on the part of the assembly for the adoption of an artificial conduct towards the executive power.

But it may be said, if the direction of affairs ought to be confided to the officers of the executive power, — if they ought to propose those measures which the necessities of the state require:—how, then, can this agree with the desire which all the members may have of making propositions? For this right, if it be to be efficacious, supposes that the assembly has the power of entertaining them. But if it thus entertain them, the ministerial plan will be liable to be interrupted by incoherent, and even entirely subversive motions: there will be no longer any regular progress; and there may even result from it general confusion in the government.

I can only answer this objection by supposing in the assembly an habitual disposition to leave to the ministers the ordinary exercise of the right of proposing.

The general privilege should be reserved for all the members without distinction; but the right of priority should be conceded by a tacit convention to the ministerial propositions.

It is here that it is proper to notice the conduct of the British parliament.

In the ordinary course of affairs, all eyes are fixed upon the minister: whether he present a plan, or speak in support of it, he is listened to with a degree of attention which belongs only to him. By a general, though tacit arrangemnt, important business is not commenced before he arrives.

He proposes all the principal measures—his opponents confine themselves to attacking them: in short, he is the director, the prime mover, the principal personage. Still he has not by right the slightest pre-eminence: there is no rule which secures to his motions, a preference above those of any other member; — there is no rule which gives him a right to speak first — it is an arrangement which exists only in virtue of its convenience and its utility. Whilst the minister possesses the confidence of the majority, he is sure to preserve the right of the initiative: when he loses this confidence, he cannot much longer remain minister, but must give place to another.

It may be well here to attempt to dissipate an error which may justly be called popular, both on account of the little reflection which

* In ancient times, the Scottish parliament was subject, as to the order of its labours, to a committee named by the King: the Lords of Articles alone had the initiative of all measures. They prepared beforehand everything which was to be presented to the Assembly, and consequently had an absolute negative, much more powerful than they could have had after the debate. — Robertson's History of Scotland. Book I. Reign of James V. [They were not named by the King, but by the several Estates of the Parliament.—*Ed.*]

it discovers, and the number of those who adopt it. This error consists in concluding, that an assembly like the House of Commons is corrupt, because in its ordinary course it is led by the ministers. This pretended proof of the corruption of the assembly, or its subjection, is, on the contrary, a real proof of its liberty and its strength. Why does the minister always take the lead in Parliament? It is because unless he had the power thus to lead, he would no longer be minister. The preservation of his place depends upon the duration of his credit with the legislative assembly. Were we to suppose all the members endowed with the most heroic independence, matters could not be better arranged than they are at present.

CHAPTER VIII.

OF THE DIFFERENT ACTS WHICH ENTER INTO THE FORMATION OF A DECREE.

Those who pay only a superficial regard to a political assembly, may think that there is nothing more simple than a *motion*, a *debate*, a *decree*. What is there here which is the object of science or art? The ordinary affairs of life call us all to propose, to deliberate, to decide. There are scarcely any notions more familiar than these.

It is true, it is easy to form a conception of these operations, but it is difficult to describe them. In this respect, it is the same with the actions of the mind as with those of the body. To move the arms, requires but a moment: to explain this movement — to describe the muscles which perform it, requires great anatomical knowledge.

Let us trace the formation of a decree. — The work which serves as its foundation, is a simple project proposed by an individual; when he presents this project to the assembly according to the prescribed forms, he makes what is called a motion.

The original motion having been made, every posterior motion with regard to it can only have one of two objects—either to *amend* or to *suppress* it. There are, therefore, two kinds of secondary motions: —

Emendatory motions.
Suppressive motions.

The first include all those which modify the original motion; since all these modifications may be considered as *amendments* — that is to say, ameliorations or corrections.

The second class will include all those which directly or indirectly tend to cause the original motion to be rejected; as by demanding priority in favour of some other motion, or by proposing an adjournment of the question for an indefinite time, &c.

In order to produce a decree, only three acts are absolutely necessary: — 1. To make a motion; 2. To vote; 3. To declare the result of the votes.

But before arriving at the conclusion, there are, in the ordinary course of things, many steps or intermediate acts proper to be taken.

We shall here set them down in chronological order: —

1. Previous promulgation of motions, projects of laws, and amendments.
2. Making the motion which exhibits the project.
3. Occasionally ordering it to be printed and published.
4. Seconding the motion.
5. Deliberating upon it.
6. Putting the question.
7. Voting summarily.
8. Declaring the result of the summary voting.
9. Dividing the assembly — that is, demanding distinct voting.
10. Collecting the votes regularly.
11. Declaring the result.
12. Registering all the proceedings.

CHAPTER IX.

OF THE PROMULGATION OF MOTIONS — OF BILLS — OF AMENDMENTS, AND THEIR WITHDRAWMENT.

It is proper that the assembly should previously have before its eyes a statement of the business with which it is to be engaged, that nothing may be left to chance, and that it may not be exposed to surprises. It ought to impose on all who wish to present any motions to it, the obligation of duly preparing them, and making them known. A discussion, the object of which has been previously made known, will be the result of more deliberation, and consequently shorter: the reasons for and against, having been the subjects of meditation, the debaters will have ascertained their strength, and taken up their positions accordingly.

This object may be accomplished by a single regulation. Let the secretary open three distinct registers—for Motions, *Bills* or projects of laws, and Amendments; every member being allowed to present to him a motion to be registered; and all motions, after having been printed in a journal which should only have this object, should come before the assembly in the order in which they are registered, subject to the reservation of which we shall presently speak.

The journal of motions being published daily, those who wish to propose any amendments should be bound to make them known beforehand, by presenting them to the secretary, who should transcribe them in his register, and cause them to be printed in the journal of amendments.

The same steps should be followed with respect to bills: they should be inserted in a separate register, in the order of their presentation; but they ought not to be introduced into the assembly until three months after their inscription, unless upon special application this period should be shortened.

Such ought to be the foundation of the arrangement for the table of occupations, which might be called, as in the British houses of parliament, The order of the day.

But this inflexible order for motions and bills, this arrangement founded only upon the circumstance of anterior registration of accidental priority, would be liable to the most weighty inconveniences; it might prove destructive of real order, of that order which belongs to the train and connexion of matters, and thus prove incompatible with the liberty of the assembly. Because one motion has been placed upon the list before another, it does not follow that it deserves the preference: the last in date may be the first in importance.

It would even be impracticable to subject all motions to an absolute rule requiring previous registration. Unexpected incidents demand sudden measures; and in the course of its discussion, a subject may assume altogether a different appearance; a change made in one part of a project, may require an alteration in another — an unexpcted breach must be repaired by sudden expedients.

The influence of a list of motions is therefore reduced to this: — it would serve as a guide for the ordinary progress of the debates — it would present a general picture of the labours; but it would not restrain the liberty of the assembly, which ought to be able at any time to accelerate certain motions, or to receive new ones which have not been registered.

What has been said respecting motions is equally applicable to bills: but a bill admits of greater delay than a motion; and an interval of three months would not in general be too great between the presentation of a bill to the assembly, and its passing into a law. If it have been possible to do without a given law during the course of past ages, it is possible to do without it at least three months longer. Besides, as soon as a law is proposed, the whole of the nation is more or less interested: the object is permanent; it ought therefore to be known to the public, and all the information possessed by the different parties in the kingdom ought to be collected concerning it; unless it be pretended that the deputies, by a miraculous concentration, not only possess all the judgment and knowledge of the whole nation, but even of the world itself. Laws ought to be founded upon facts; but inasmuch as the facts are particular, they cannot be collected, unless the necessary time be allowed to the parties interested to present them to the legislators.

But in respect of bills as well as motions, an inflexible rule is not required: latitude must be left for unforeseen cases, and especially in favour of the government, which is charged to provide for urgent circumstances. If after an insurrection, or on the eve of an invasion, an interval of three months were required after introducing a bill before it were passed into a law, the evil might have been consummated before it was possible to consider of the remedy. This would be to play the engines when the fire was extinguished.

It may be remarked, that the plan here proposed differs from that of the English parliament, every member having here the right to introduce a bill; whereas in the English parliament a bill cannot be introduced without leave given by the House — a practice well calculated for preventing the consumption of time upon frivolous or dangerous projects of laws: but when a member moves for leave to introduce a bill, the House must consider whether it will admit or reject it. This power which it now exercises upon the motion, I propose that it should exercise over the bill at the moment in which it will be presented; that is to say, that the assembly should then decide whether it will entertain it or not; because it will then decide upon better grounds, as the bill will then have been published.

It is sometimes the custom that bills should be printed before the debate; but this is not the case except upon special motion, which motion is sometimes rejected; — and, when printed, they are only distributed to members of parliament. In this respect there is a fundamental error: the printing ought to be the rule, and also the public sale of such bills. Before the invention of printing, and when the art of reading was unknown to three-fourths of the deputies of the nation, to supply this deficiency, it was directed that every bill should be read three times in the House. At the present day, these three readings are purely nominal: the clerk confines himself to reading the title and the first words. But a most important effect has resulted from this antique regulation. These three readings have served to mark three distinct degrees — three epochs — in the passing of a bill, at each of which the debate upon it may be recommenced at pleasure.

Motions and bills being thus printed and published in journals destined to these objects alone, a regulation should be made, that amendments should be printed and published in the same manner. Why should they not be? If I wish to oppose a motion, ought my intention to come upon the assembly by surprise? — ought its author to be deprived of the knowledge of my objections, and of leisure

to prepare an answer to them? — ought I to be allowed to take advantage of him by an unforeseen attack? If I am only anxious for the success of my own schemes, the unforeseen amendment will best suit my purpose; but if I only desire the success of reason, I ought to make it known before the debate.

If all the amendments are previously published, and presented all together, the assembly will have before its eyes a complete picture of the subject of discussion — a picture which will itself be a safeguard against the inconsistencies and contradictions which are so likely to be introduced into a composition of which all the parts are only considered successively. The more completely it is possible to present them simultaneously, the less is the exposure to this danger. This is the grand advantage of synoptic tables: the reciprocal dependence and union of all the parts is at once perceived: any incoherence strikes the eyes.

But the rule ought not to extend to the exclusion of amendments arising at the moment; for new ideas may spring out of the debate itself, and to reject a salutary amendment because its author had not foreseen it, would be an absurdity. All that can, and all that ought to be required of him, is to declare that the delay in the announcement of this amendment was not intentional — is not insidious; that he did not intend to take the assembly by surprise. The nature even of the amendment will indicate the motive which gave rise to it.*

When a member has caused a motion, a bill, an amendment, to be inscribed in the register, he should not be allowed to withdraw or abandon it, without leave from the assembly. A simple prohibition alone is not sufficient in this respect: it ought to be an inflexible law. If the author of the act in question be not present on the day fixed. to support it—unless there be lawful reason for absence, he ought to incur the censure of the assembly, and his name should be inscribed in a separate book, having for its title, *List of the deserters of motions*, &c.

This rigorous law is requisite — 1. In order to prevent thoughtless motions, and the confusion which would be produced by the false appearance of a great mass of business which would vanish at the moment in which it was touched.

2. To prevent the destruction of public confidence by accustoming the people to see that the motions which are announced are dropped by neglect.

3. To prevent the abuse which might be made of this instrument by announcing motions which there is no intention to support, either for the purpose of spreading alarm, or to affect the public funds; or for the purpose of preventing other parties from registering their motions or their bills, by an apparent monopoly of business; and because the evil which an individual could effect in this respect would be susceptible of the most alarming extension by means of combination among the members of a party.

CHAPTER X.

OF THE DRAWING UP OF LAWS.

WE proceed to consider the motions as compositions destined to become laws, and be

* If it be necessary that motions should be composed beforehand, in order that they may be presented to the legislature, which is composed of the élite of the nation, — for a much stronger reason is this precaution indispensable with regard to popular assemblies, which are formed and dissolved in a day, and which can have little or no practice in the art of debate.

Such assemblies often take place in towns or counties in England, for the purpose of presenting petitions or addresses, either to the King or the Houses of Parliament.

If in these assemblies an individual propose a petition or address previously prepared, his antagonists seldom fail to draw from this circumstance an argument in its disfavour. There is indeed a term of ridicule for the designation of such previously prepared motions; they are called *pocket motions* and *pocket petitions*. By these terms an intention is imputed to their author of surprising and deceiving the assembly, by causing his own personal ideas to be received as a public act.

There is in this suspicion a mixture of reason and error — of inadvertence and reflection.

The inadvertence consists in not considering that a motion, which is to be the act of all, must begin by being the act of one individual, — and that a writing of this kind, as well as every other writing, ought to be the better, precisely because it is the work of time and reflection.

But, on the other hand, it is an instinct of reason to distrust the ascendency which one individual may obtain over an assembly by proposing a measure which he had prepared at leisure, but upon which the assembly is called to decide at once, without having had time to examine its foundations and consequences.

What follows? Ought no one in a popular assembly to propose any motion previously prepared? This certainly ought not to be the rule, — but the rather, that before the day of assembly, the motions intended to be made ought to be published.

There exist, in some assemblies of this kind, regulations which prohibit their convocation without a public declaration of the object of the meeting. This regulation ought to be universal; and there ought to be added to it, as a necessary condition, that the principal motion in its totality should be annexed to the act of convocation; that there should be a sufficient interval to allow of the publication of rival propositions, and that no motion should be presented to such assemblies, which had not been previously made known to the public. Will it be said, these are fetters and stumbling-stones for freedom. This would be a mistake: they are parapets upon the edge of precipices. Everything which renders reflection and order necessary in the proceedings of a free people is the assured safeguard of their rights.

presented to the examination of the assembly. In this respect it is desirable that they should possess that form which will allow them to be discussed in detail, and amended.

Regulation cannot prescribe perfection in style; but there are certain defects which it may prevent, certain conditions which it may impose, because every one may be subjected to them. The four following points may be prescribed: —

1. Brevity in the articles.
2. Simplicity in the propositions.
3. The pure expression of will.
4. The complete exhibition of all the clauses which the law ought to contain.

If these conditions are observed, whatever may be the extent of a motion, it will be of a manageable and ductile form; it will be easy to consider it in all its parts, and to amend it.

1. Brevity in the articles.—What is meant by an article is, so much matter as it is intended to put to the vote at one time. The longer the articles are, the more difficult is it to understand the whole together, and distinctly to see all the parts. But is it sufficient to recommend brevity? No: the force of a law ought to be given to this precept, by declaring that no project of a law, containing more than one hundred words for example, should be received, unless it were divided into numbered paragraphs, no one of which should exceed the above measure. This expedient, altogether singular as it may at first appear, is however the only one of absolute efficacy.* When it is necessary to present a long train of ideas, it is proper to assist the understanding by brevity of style. Each separate sentence forms a resting-place for the mind.

The paragraphs in a law ought to be numbered. There is no means more convenient and short for citation and reference.

Acts of parliament are exceedingly defective in this respect. The divisions into sections, and the numbers which designate them in the current editions, are not authentic. In the parchment original, the text of the law — the whole act, is of a single piece, without distinction of paragraphs, without punctuation, without figures. The word section is not even met with there, nor anything which corresponds with it. How, then, is indication made of the termination of one article and the commencement of another? Always by repeating the same formula, the same introductory clause, — *and it is further enacted by the authority aforesaid*, or some other phrase to the same effect.

This is a species of algebra, but of an opposite character. In algebra, one letter supplies the place of a line of words; in this, a line of words very imperfectly supplies the place of a single figure: I say very imperfectly, for these words serve for the purpose of division, but they are of no use for the purpose of reference. Is it wished to amend or repeal one section in an act? As it is impossible to point out this section by a numerical reference, one is obliged to do it by circumlocutions, which produce repetitions and obscurity. It is partly from this cause that acts of parliament are unintelligible compositions to all those who have not made them the object of long study.†

The first acts of parliament were passed at a period in which punctuation was not yet in use — in which the Arabian figures were not known. Besides, the statutes in their state of primitive simplicity and imperfection, were so short and so few in number, that the want of division could not produce any sensible inconvenience. These things have remained upon the same footing, partly from negligence and routine, but much more so from a secret interest on the part of the lawyers, who have found their advantage in this obscurity of the legal text, and who oppose to every reform the bugbear of innovation. Our forefathers lived for ages without the knowledge of commas, stops, and figures: why should they be adopted now? The argument amounts to this — Our forefathers lived upon acorns and mast; corn is therefore a useless luxury.

2. Simplicity in the propositions.—This is the principal point: the rule prescribed above respecting brevity, is established essentially on account of this.

Every article ought to be reduced to a pure and simple proposition; or at least, an article ought never to include two complete and independent propositions, of such nature that the same individual may approve one and reject the other.

Clearness would be carried to the highest point, if each article presented a complete sense, without reference to any other; but in a composition which has many parts, this species of perfection is impossible. The idea even of arrangement excludes that of independence.

A mathematical proposition is demonstrated by reference to propositions previously demonstrated; and in every series of reasoning, the links are multiplied in proportion as they are removed from the first step.

Among *conjunctions*, there are some which afford a mischievous facility for binding together an indefinite number of sentences into one. Of this kind are, in French, *d'autant que, considerant que;* in English, *whereas;* in Latin, *quandoquidem*. The introduction of

* The longest paragraphs in the Code Napoleon do not exceed one hundred words, and there are very few of that length

† See *General View of a Complete Code of Legislation*, Chap. XXXIII. *Of the style of the Laws.*

these phrases is a principal fault in the style of the laws: by means of them, a mass of confusion is created; objects which it is most desirable to keep apart, being thus without reason, oftentimes coupled together.

But if the propositions ought not to be independent one of another, they need not be made *complex*.

A complex proposition in matters of law, is one which includes two propositions, one of which may be approved, and the other disapproved.

The following question, proposed to the Notables in 1788, may serve as an example: it referred to the composition of the States-General: —*Ought certain qualifications to be required of the electors and the persons eligible?* By the form of this phrase, two distinct propositions are presented, as if they formed only a single one.

Ought certain qualifications to be required of the electors? —

Ought certain qualifications to be required of the eligible? —

These are two questions, so distinct that each ought to be decided by different considerations, which may perhaps lead to a negative with regard to one, and an affirmative answer as to the other. But by uniting them in this manner, the mind is led into error: it is led to consider them as so connected together, that it is proper to give to them one common answer, either in the negative or affirmative.*

Suppose that a proposition, which is presented as a single one, really consists of two propositions — that you approve the one, that you disapprove the other: if it remain undivided, whatever may be the decision, one proposition will be passed in opposition to your will; — if it be divided, you are free to choose—you can vote against the one without voting against the other; and this, which may happen to one individual, may happen to the whole assembly.

By means of complex propositions, an assembly free from all exterior constraint, may cease to be free by a species of internal constraint: a good law may be used as an instrument to compel the passing of a bad one.

Conjunctions may arise, in which an assembly may be compelled to sacrifice its most important rights. A certain law may be proposed to it, not only good in itself, but even necessary to its own preservation, or the preservation of the state; and to this law may be joined another, by which it may be deprived of some of its essential prerogatives. What can it do? It is obliged to submit. It is in the situation of the patriarch, who, pressed with hunger, sold his birthright for a mess of pottage.

This Machiavelism, it may be said, is a gratuitous supposition—a pure fiction. But it is not: history furnishes numerous examples of it. In the ancient republics, the *initiative* of the laws belonged exclusively to a senate: the people had no other alternative than that of approving or rejecting the whole together; the liberty of choice was not left to them; — their chiefs made them purchase a desired law, a necessary law, at the price of some other law unfavourable to their interests.

3. Another principle of composition: *Employ only a pure and simple declaration of will, without intermixing therewith, reasons, opinions, or fancies, distinct from that same will.*

To assign the reasons for a law is a separate operation, which ought never to be confounded with the law itself. If it be desirable to instruct the people, it may be done in a preamble, or in a commentary which accompanies the law; but an imperative law ought only to contain the simple expression of the will of the legislator. Intended to serve as a rule of conduct, it cannot be too simple, too clear, too free from dispute. If reasons and opinions are intermingled with it, all those are ranged against the law, who do not approve the reasons or opinions which it expresses: instead of becoming stronger, it becomes more feeble; an instrument of attack is prepared for its adversaries, and it is delivered up to their disputes.

A single epithet is sometimes sufficient to alter the simple expression of the will. The same effect may result from the use of a term which implies blame or approbation, when it would have been proper to employ a neutral term — *heretic*, for example, instead of *dissenter* — *innovation* instead of *change* — *usury* instead of *illegal interest*.

These eulogistic or dyslogistic terms produce all the inconveniences which we have developed above: they include complex propositions; they not merely state a fact, upon which all the world may be agreed, but also an *opinion*, which may be received by one party, and rejected by another.

Let us give an example: — "It is decreed that no heretic shall be allowed to sit in this assembly."

First proposition: "It is decreed that no man who is not of the established religion of the state, shall be admitted to sit in this assembly."

Second proposition: "This assembly declares, that all those who profess any other religious opinions, merit the odious denomination of heretics."

Here are two propositions altogether dis-

* This sophism corresponds with that which in the logic of Aristotle is designated by the words —"*Secundum plures interrogationes, ut unam* — are honey and gall sweet?" This is a *jeu d'esprit* for perplexing children, but it is often employed in legislation for deceiving men.

tinct and foreign to one another. The one declares a resolution relative to a fact; — the other declares the state of the opinions and affections of those who vote. The same individual might adopt the first, and reject the second.

Thus to unite into one proposition, two different things, is to commit a species of falsification, and to destroy the freedom of voting, from which no benefit can result.

Hence, from inserting in the body of a law, opinions or reasons foreign to the law, the measure may be exposed to rejection, although conformable to the general wish of the assembly.

This may happen, because, although they may be agreed upon the measure, the voters may differ much with regard to the reasons which lead them to adopt it; and if the reasons which are assigned, are opposed to the opinions of the majority, they will experience a very natural and just repugnance to profess opinions which they do not hold. To require them to pass such a law is, in fact, to exact a false declaration, and make them tell a lie in the law.

Let us imagine the following proposition: — "Considering that there is no God, all penal laws relative to the divinity are abolished."

Even should all the members of the assembly be unanimous in favour of the abolition of these penal laws, there might not perhaps be found a single one who would not be shocked by this declaration of atheism, and who would not rather choose to reject the measure altogether, than to obtain it at this price.

It would seem that in a free assembly each proposer of a motion ought to observe this rule, if it were only as a measure of prudence, since an accessary of this nature can only tend to expose the principal motion to be rejected.

But the spirit of party does not reason thus. The more clearly a motion includes any clause offensive to its antagonists, the more clearly it proves the strength of those who cause it to pass: their triumph increases with the mortification of their antagonists.

We will give an example of this petty war of parties; we shall seek it in a remote period, although it would be easy to find specimens nearer to our own times; we shall see a motion produced in this spirit of hostility, applied in an opposite direction by the insertion of motives and opinions which presented it under an aspect altogether new.*

"A motion was made, and the question being proposed, that it be an instruction to the said committee that (in order to restore in some measure the trade of this kingdom) they do consider of the proper means to take off the duties upon soap and candles (which are so very burthensome to the manufacturers, as well as the poor in general.")

The intention of the two phrases included in the parentheses is clear. The opposition wished to throw odium upon these two taxes, without considering that similar means might be applied to all the taxes without distinction.

The two clauses were first excluded by two very proper amendments. But this triumph was not enough: the ministerial party, wishing to throw out the motion by appearing to amend it, caused the following clause to be inserted: —

Taxes "granted and made a security for several large sums of money advanced for the service of the public, upon parliamentary credit, the greater part of the surplus whereof belong to the sinking fund, appropriated to the discharging the national debt."

It need scarcely be added, that the motion thus altered, no longer agreeable to the one party or to the other, was thrown out by common consent.

4. *A bill ought to contain a complete exhibition of all the clauses that the law ought to contain.*

This has reference to certain terms which are liable to be exchanged for terms of the same kind: for example, one quantity for another quantity, one number for another number, one portion of time for another portion of time, &c. *The imprisonment shall be* [*for a year.*] *The fine shall be* [*one tenth part of the parties' income.*] *The reward shall be* [*twenty pounds sterling.*]†

In the projects of bills which were presented to the British parliament, the custom was to leave these points in blank between two crotchets thus: The imprisonment shall be [;] the fine shall be [.]

The points thus left in blank were those respecting which there is great latitude of choice. The author of the bill has no determinate reason for the choice of one term rather than another. The first debate turns rather upon the principle of the measure, without regard to these points. They are determined in committee upon the motion of some member. The journals of the House of Commons present many examples of cases in which it has been unwilling to receive bills, because the author, instead of leaving these blanks, had filled them up.

It was said, that liberty was thus better secured; so long as no term is fixed, there is greater latitude of choice.

I cannot perceive the force of this reason. Liberty exists upon this point as well as upon

* Journals of the House of Commons, Vol. XXI. p. 235, 24th February 1728.

† These exchangeable terms may be called *congeneric competitors.*

every other part of the bill. It is lawful to propose the smallest number in place of the greatest, one place instead of any other place, one quantity instead of any other quantity, and so of the rest.

On the other hand, the discussion cannot but be improved, when it has a determinate foundation upon all points. It is necessary at last that the blank should be filled up—that some one should propose a term; and who is better able to do this, than the author of the motion?—from whom can we expect greater knowledge of the subject?* If no one be obliged to think about the matter, is it not to be feared that these blanks will be filled up with indiscreet precipitation, as details of trifling importance.

This custom of leaving blanks most probably arose from the prudence of the framers of the laws. "If," they may have said, "the term be left blank, the ideas of nobody will be hurt; but if a specific term be offered, which of course will not please everybody, the loss of a number of votes is risked upon this point alone." This train of reasoning is not unfounded; since nothing is more common in political assemblies, than that want of candour which fixes upon the first objectionable matter of detail, which might easily be remedied, and converts it into a radical objection to the measure in which it appears.†

CHAPTER XI.

OF DEBATES.

§ 1. *Of the Opening of a Debate.*

OUGHT a motion to require to be seconded? A motion is not entertained by the House of Commons, until it is supported by some one beside its author; that is to say, until it is seconded.

This regulation is considered proper, in order to prevent the introduction of motions which would consume time without producing any fruit. Before occupying the time of the assembly, the proposer should consult a friend. If he cannot find a single approver, where is the evil of abandoning his motion?—what chance has he of persuading the majority, if he have not succeeded with the man of his choice?

But this method has but little efficacy: it has none against party motions—none against a man who in the assembly has a civil or an easy friend—none against two fools or two madmen, who are determined to support one another.

Besides, it is only applicable to original motions, and not to incidental motions; that is to those which arise in the course of the debate—to those amendments respecting which there is no opportunity of concert with any person.

It may be objected against this custom, that it tends to discourage those who have most need of particular encouragement—of isolated persons, jealous of their independence, not wishing to connect themselves with any party. Should a man of this temper, after two or three trials, find no one to second him, this would be sufficient to dishearten him. But he ought not to conclude that a motion is frivolous or absurd, because at the first glance it has been rejected in this manner. How many other reasons, beside that of the demerit of the motion, may have operated to produce this refusal to second it! One may not have chosen to put himself forward; another have not liked to act the part of subaltern; a third have foreseen that it would not be successful; a fourth, that it would have made others his enemies. Many may have refused on grounds altogether foreign to the object of the motion.

When a rule operates only as a restraint, if it be not useful it is mischievous.

The House of Lords has never recognised this rule, and no one has found out that any inconvenience has resulted from the want of it.

Before the author of a motion is permitted to speak upon it, the motion ought to be read.

The motion is the only subject to which his speech ought to apply. If its subject be unknown, the speech will lose a great part of its effect. It is impossible to judge of the force or weakness of the arguments, unless the object to which they refer is clearly present to the mind.

There is not a more efficacious rule than this for preventing useless discourses. If a member who had no motion to make were to begin to speak, he would find himself obliged at the first moment to give a justifying reason for so doing: if he had none, he would be reduced to silence.

In the House of Commons, the rule is, not to speak, but upon an admitted motion, or for the purpose of introducing one; but as it is not requisite to begin by presenting a motion, it sometimes happens that long speeches are made, which are not followed by a motion.

This is an example of those laws which would be so good, so advantageous, provided only that they were observed.

In the English practice, the custom is to state beforehand to the House, more or less of the object of a motion, according to the supposed degree of its importance. But this statement is confined to a general indication: the whole motion is neither announced, nor

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* These blanks are now always filled up in a type of a character different from that of the other parts of the bill. — *Ed.*

† For the other rules relative to the drawing up of laws, see also *General View of a Code of Laws*, Chap. XXXIII. *Of the style of the Laws.*

reduced to writing. Is not this a defect? Is it not stopping half way? Certainly the same reasons which lead you to require that a motion should be announced beforehand, ought to make you desire that it should be presented complete. Is it not ridiculous to say to an assembly of legislators—"Divine, conjecture, imagine what the motion will be of which I have told you the title?"—and to hold their curiosity in suspense, as if it were necessary to excite a dramatic interest, or to catch them by surprise?

The terms of the motion not being previously known, it is not possible to prepare amendments: hence, everything concerning them is a scene of precipitation. As they are proposed without plan, they are combated under the same disadvantage: they too frequently present vague and incoherent ideas, and are crude and indigested productions: but the greatest evil which arises, is that which it is not possible to see or to appreciate—the negative evil, the evil of privation; that is to say, the non-existence of the useful amendments which would have been offered, if leisure for reflection had been afforded by a previous knowledge of the whole motion.

We have made one step. The motion being read, its author ought to be allowed the right of pre-audience. It cannot be presumed that any other person can present the reasons for it, with more advantage than himself.

It is evident that no person ought to be heard against a motion, before some one has spoken for it. For if there be no argument to be produced in its favour, the combating the motion is loss of time. The arguments for, ought to appear first, that those who oppose them may have a fixed point of attack, and not wander into vague conjectures.

In an assembly in which the members sit whilst they speak, it would be proper to agree upon a word—for instance, *dixi*—which should mark the close of a speech. This final word would prevent that species of preparation, that indecent impatience, which is manifested in an assembly where those who wish to speak, watch all the accidental pauses of the speaker, and do not wait till he has finished before they begin.

If the member stand up whilst he speaks, the end of his discourse will be marked by his sitting down; and this gesture will more certainly reach the eye, than a word reaches the ear. The above rule would therefore be more necessary in an assembly in which the members sit whilst speaking, than in one in which they stand; but it would be useful everywhere, as a means of preserving the speaker from the fear of interruptions, and of conducting the debate with more propriety.

In a large assembly, the person speaking ought to stand. In this attitude, his lungs have more force, and his voice is more free—he exercises a greater ascendency over the auditory—he more readily perceives the impression he produces. But this ought not to be made an absolute rule, because it is not possible to fix the limits between a large and small assembly: besides, there are infirm persons who have sufficient strength for speaking, who are not able long to remain standing. A wounded officer ought not to be deprived of the right of speaking for his country. The last brilliant efforts of his eloquence were uttered by Lord Chatham, when he was feeble and languishing, and almost obliged to lie upon his seat.

§ 2. *Of free and strict Debate.*

There ought to be two kinds of debate: in one, replies should be allowed; in the other, not. The first of these I should call *free*, every member being allowed to speak as often as he pleases; the second I should call *strict*, every member, with a single exception, which will be shortly noticed, being allowed to speak only once.

The strict method may perhaps be necessary in large assemblies, where there are many who wish to speak. It becomes necessary, upon the principle of equality, to secure to each member the right of being heard: there would be a kind of injustice in allowing any one to speak twice, whilst there were others who had not once been heard. If, then, there be a superfluity of speakers—that is to say, more than can be conveniently heard, consistently with the speedy progress of business—the exclusion of replies becomes a necessary law.

But still the free method possesses great advantages. In an argument between two persons, the discussion is better followed—the reasoning is more connected, than when many persons are engaged. Each reply tends to increase the information received, and to fortify the impression made. The debate becomes animated and more interesting: each one lends his attention to the argument—endeavours to understand it, and to foresee the reply it will call forth: no movement is either lost or retrograde—every step taken leads on to the conclusion. This interest is either weakened or disappointed whenever a new speaker interferes to disturb the thread of the debate, and to throw in altogether different ideas. Hence, the first feeling of men, their natural instinct, is altogether in favour of this manner of debating between two parties who alternately speak *pro* and *con*.

In the British parliament, both these methods are employed: the one when the assembly is said to meet as the *house*—the other when it meets in *committee*. When the house is assembled, the rule of speaking only once is strictly observed. In committee, it is the custom to allow of replies; and the discussion

is frequently confined to a small number of individuals who have paid particular attention to the question. At all times this is rather an indulgence than a rule; and thus it ought to be, for there are some obstinate speakers who will never have done; and replies have this inconvenience, that they often lead to personalities, which might make the debate degenerate into bitter and fruitless contentions.

In allowing the liberty of replies, you expose the debates to a duration incompatible with the transaction of business. This is the strongest objection against them. But first, the cases in which prompt decisions are necessary do not often arise in a legislative assembly; and in such cases it is always master of its own rules, and always at liberty to act according to circumstances.

Secondly, Can any time be considered as lost, which has been occupied in *bona fide* discussion, how long soever that discussion may have been? Is rapidity the principal object? Ought we to avoid a few moments of weariness, at the risk of many hours of repentance? Excess of examination need not be feared: bad laws are rather the results of inattention and precipitation. The general rule ought to be, to reject nothing which may enlighten the assembly: but how can it be decided beforehand, that an individual who wishes to speak has nothing useful to say?

In conclusion, it is doubtful whether the admission of replies would prolong discussions. When a question is quite clear—when the two parties find that their opposition is irremediable, the debate has reached its natural conclusion, and every one will be desirous of seeing it finished. Now, the liberty of reply has a direct tendency to lead the discussion to this point. Two antagonists, engaged upon a question for which they have made preparation, will reply to each other with more strictness—they will go at once to the point without losing time in set phrases, exordiums, and apologies, as is done by each new orator, that he may give to his arguments the polish and ornaments of speech.

After all, the free method does not necessarily deprive any individual of the opportunity of speaking: it only retards the moment at which he obtains it. It is a simple transposition of time, which takes nothing from equality.

After this exposition of the reasons for and against these methods, every assembly must decide, according to circumstances, whether it will be proper to admit the one or the other of these forms of debate.

But even when replies are not permitted, an exception should always be made in favour of the author of the motion. *He who opens the debate, should be allowed to speak last in reply.* He may naturally be presumed to be best acquainted with the strong and weak points of his cause, and if he were not allowed the right of reply, objections to which he only could reply, *might* impose upon the assembly. In the British parliament, this last reply is frequently that which attracts the most attention. In this the speaker concentrates all his strength, and brings it to bear upon the essential points which ought to determine the judgment. "*Videndum præcipue utrique parti ubi sit rei summa. Nam fere accidit, ut in causis multa dicantur, de paucis judicetur.*"*

§ 3. *Of three Debates upon every proposed law.*†

The general rule in the English parliament is, that every bill shall be debated three times upon different days, and these days oftentimes distant from each other. These are called *the three readings* of the bill. The bill may be thrown out on the first, the second, or the third reading; but it is not passed till it has been read three times.

This is not all. Between the second and third reading, the bill is discussed in a *committee of the whole House*

This general committee (which is spoken of elsewhere) admits of forms of discussion more free than those allowed in the regular debates. A chairman is chosen for the occasion;—the details of the measure are discussed;—the same persons are permitted to speak several times upon the same subject; and the discussion is thus generally carried on by the individuals who possess the greatest knowledge of the particular question.

With regard to the *three readings.* The first is almost confined to the introduction of the bill, and general observations upon it;—the second is a debate upon its principles;—the third regards it as a whole, the terms of which have been considered and settled.

The advantages of these reiterated debates are—1. Maturity in the deliberations, arising from the opportunities given to a great number of persons, of speaking upon different days, after they have profited by the information which discussion has elicited; 2. Opportunity afforded to the public, to make itself heard—and to the members, to consult enlightened persons out of doors; 3. Prevention of the effects of eloquence, by which an orator might obtain votes upon a sudden impulse; 4. Protection to the minority of the assembly, by securing to it different periods at which to state its opinions; 5. Opportunity for members absent during the first debate, to attend when they perceive that their presence may influence the fate of the bill.

Every one knows by experience, that the

* Quint. V. 13.

† In this chapter I have attempted to supply a subject omitted by Mr. Bentham, who makes frequent allusions to these reiterated debates, but who has not treated of them expressly.—*Dumont.*

strongest reasons alleged by two parties cannot be estimated at their true value the first time of hearing: they make either too much or too little impression; — too much, if they are developed with all the seduction of authority and eloquence — too little, if they are opposed by violent passions, interests, or prejudices. After an interval of a few days, the mind becomes calm — public opinion has time to act — the effect of mere eloquence ceases to operate — reason resumes its sway. Very different views are often brought to the second debate, from those which were successful on the first, — and the two parties approach each other with arguments matured by reflection and communication with the public.

Parties appear to have a necessary existence. If a single debate decide the adoption of a law, each party has an extreme interest in employing all its means to secure the victory of the day — and great heat and animosity are produced by the debate. But when it is known that a first victory is not sufficient — that the struggle must be renewed a second and a third time with the same antagonists, — strength is reserved — it is tempered, that it may not injure the cause in which it is employed; no one dares to take an unlawful advantage, because this would be to supply arms to his adversaries; — and the party in the minority, which gradually sees that its ultimate defeat approaches, gives way to it with the more moderation, inasmuch as it has been allowed every opportunity of preventing it.

In the British parliament, independently of the *three readings* which are necessary, there are many other occasions in which it is possible to renew the debate during the *progress of a bill* — the technical term which comprises all the stages through which it must pass before its completion. It must, as I have already said, be *committed* — and it may be *recommitted*. It must be engrossed, that is, written on parchment, to become the authentic text. It ought at last to be transmitted to the House of Lords, and it may be sent back again to the Commons. Each of these stages are passed upon motion by a member, and each motion may become the occasion of a new debate. The *opposition* very rarely makes use of these different means for retarding the progress of a bill; but they are held in reserve for extraordinary occasions, when delay may produce important results.

It may be objected, that this plan occasions great delays, and that circumstances may imperiously require that a law should be passed with rapidity. To this it may be replied, that in cases of necessity the Houses of Parliament can suspend their usual orders, and that a bill may be made to pass through all its stages in both houses in one day. An example of this kind occurred, if I am not mistaken, during the mutiny at the Nore in 1797; but such extreme measures arise from urgent necessity, which overcomes all opposition.

Those who consider the slowness of these forms as objectionable, do not perceive that their objection is directed against reflection — against that information which is often the fruit of time and study. There may be repetitions; but a reasonable conviction is not attained at once. The best argument requires to be presented at different times, and under many aspects. It is by these means that it becomes adapted to different minds, and is deposited in the memory. Those men who are persuaded by a word, are lost as easily as they are gained. Allow of obstinacy in debate, and there will result from it perseverance in conduct. In France, the terrible *decrees of urgency*, the *decrees for closing the discussion*, may well be remembered with dread: they were formed for the subjugation of the minority — for the purpose of stifling arguments which were dreaded. The more susceptible a people are of excitement and of being led astray, so much the more ought they to place themselves under the protection of forms which impose the necessity of reflection, and prevent surprises.

A more direct answer may be given to this objection on the ground of delay: — Three debates necessarily require intervals, but they do not tend to render the discussion longer upon the whole — they have rather a contrary effect. Indeed, these three debates have different objects, and divide the deliberations in the most suitable manner. In the first, the question is, Shall the subject-matter be considered at all? If its consideration be refused, there is a great saving of time, because no one has been engaged in the consideration of the details. At the second reading, the question is, Shall the principle of the bill introduced be adopted? If its principle be admitted, it is then taken into consideration in committee, and each clause is considered by itself, and amendments, if necessary, proposed in it: when the whole has been thus considered, the bill is reported to the house.

At the time appointed, the project of the law, as thus prepared, undergoes a third debate: the whole of its parts and bearings being thoroughly understood, all are prepared to consider it in its principles and details; whilst those who wish again to propose their amendments can do so, if they hope to obtain the concurrence of the majority.

§ 4. *Of the exclusion of Written Discourses.*

The rule for the exclusion of written discourses is strictly observed in the British

parliament. It ought to be so in all deliberative assemblies.*

"The principal inconvenience of written discourses consists in their want of connexion — they have no relation to one another.

"It is easily perceived that a political assembly is not a society of academicians; that the principal advantage of a national senate, and of public discussion, arises from that activity of mind, from that energy of feeling, from that abundance of resources, which results from a large assembly of enlightened men who animate and excite each other, who attack without sparing each other, and who, feeling themselves pressed by all the forces of their antagonists, display in their defence powers which were before unknown to themselves.

"Attention is like the mirror, which concentrates the rays of the sun into one focus, and produces increase both of heat and light; but attention cannot be sustained except by connected discourse, and the kind of dramatic interest which results from it. When attention is excited, nothing passes without examination: every truth tells — every error provokes refutation; a fortunate word, a happy expression, is more effective than a long speech; — and as these weapons cannot be wielded in debate except by the cleverest men, the assembly is spared from ennui, and saves its time. There is nothing useful in the plan of reading, except it be to procure for mediocrity the consolations of self-love, at the expense of the public good.

"Will it be said, that these prepared discourses will commonly have greater maturity, greater depth? — that the assembly by this means is less exposed to hear dangerous and ill-considered opinions? The effect is precisely opposite. It requires longer preparation and deeper meditation to be able to speak extempore than to write at leisure. To have completely mastered his subject — to have studied it under all its aspects — to have foreseen all objections — to be ready to answer every one: such are the conditions necessary for a public speaker. But what ordinary man is not able to write upon a given subject any number of pages? One person employs writing for the purpose of facilitating meditation, to relieve his memory, to prevent the fatigue of retaining a series of ideas; another writes, that he may dismiss from his mind what he has committed to paper. It may therefore easily happen, that a man does not understand the subject upon which he has written; but he must always understand his subject, if he will speak well upon it.

"If all those who have exhibited the talent of speaking in the National Assembly, had been asked why they were reduced to the reading of memoirs upon difficult and complicated subjects, they would have accused the shortness of the time, the premature questions, the number and variety of the subjects: but they would thus have confirmed the opinion, that the plan of written discourses is bad in itself. It will never form powerful minds in a political assembly: it favours idleness of thought, and, like the habit of being carried, produces torpor and indolence.

"In England, as elsewhere, the distinguished talent for public speaking is concentered among a small number of individuals; but the plan of reading is not tolerated there, which multiplies speeches without multiplying ideas. Does it appear that there is any want of arguments in their discussion? — is there less vigour among their political combatants? As soon as the defender of a motion ceases to speak, does not the opposite party furnish an orator, who seeks, by his opposite arguments, to efface the impression which the first has made."

Those who do not possess the talent of public speaking, may communicate facts and arguments to the habitual speakers. This is the best method of making them useful. These communications — these contributions of ideas, continually take place in the British parliament.†

§ 5. *Other rules relative to Debate.*

The rules we are about to exhibit are not of the same importance as the preceding, but they all tend to prevent inconveniences, and to produce a better debate. The former were dictated by necessity, these by prudence.

1. *Address the president, and not the assembly in general.*

This custom, constantly followed in the House of Commons, is well adapted to a numerous assembly, it gives those who speak a fixed point of direction, and a common centre for all the speeches.

It is also natural that each should address himself to the individual who is officially to judge if he wander from the question, or if he fall into any irregularity prohibited by the rules of the assembly.

A speech addressed to the president of the assembly will be more grave and temperate,

* Bentham does not appear to have discussed the above topic. The paragraphs which follow have been extracted from "La Courrier de Provence, No. 65." — *Dumont.*

† They occurred even in the National Assembly. I have often seen M. de Mirabeau, in going to the tribune, and even in the tribune itself, receive notes, which he has glanced at without interrupting his speech, and which he has sometimes interwoven with the greatest art into the train of his discourse. A wit once compared him to those mountebanks, who cut a ribbon in pieces, chew it for a moment, and then pull the ribbon in one length out of their mouth again. — *Dumont.*

than if it were addressed to the whole assembly. An excited individual addressing himself to an impartial magistrate, to a respected president, will feel the necessity of measuring his expressions, and repressing the movements of his indignation and wrath.

If the members speak directly to each other, the discussion will more easily degenerate into personalities.

There is no custom more useful in a political assembly, than that of treating the president with deference and respect; and there is nothing more likely to form this habit, than the considering him as the centre of the deliberations — as the assembly personified.

2. *Avoid designating the members of the assembly by their proper names.*

This rule, strictly followed in the House of Commons, renders it necessary to recur to circumlocutions in designating a member: "*The Honourable Member on my right*," or "*on my left*"—"*the Gentleman in the blue ribbon*"—"*the Noble Lord*"—"*my Learned Friend*," &c. Most of these expressions are polite, without being insipid. The proper names would often be accompanied with a catalogue of complimentary epithets, of which we may see many examples in the speeches of Cicero pronounced in the Roman Senate: but the real inconvenience is, that the mention of the name in debate is a stronger appeal to self-love than every other designation. It is less offensive to say, "the honourable member who spoke last has fallen into a gross mistake," than to call him by his name: it is as though an abstraction were made of the individual, that he might be considered only in his political character. The observation of this rule is troublesome; and when the debaters are warm, it requires an effort to submit to it;—but this very circumstance proves that it is necessary.

3. *Never impute bad motives.*

This also is an absolute rule in British debate. You are at liberty to impute ignorance to a previous speaker — to tell him of his mistakes, his false representations of facts — but not to say one word inculpating his motives. Direct your energy against the mischievous effects of his opinions, or the measures he supports; show that they are fatal — that they tend to establish tyranny or anarchy; but never suppose that he foresaw or designed these consequences.

This rule is strictly founded on justice; for if it be difficult always to know our own true and secret motives, there is much more temerity in pretending to develope those of others;— and from our own experience we ought to know how easy it is to be deceived in this respect. The reserve which this rule imposes, is useful to all. It is favourable to the freedom of opinion. In political debate as in war, you ought not to employ any means which you would wish should not be employed against you.

But this maxim is especially conformable with prudence. Is your antagonist in error? — he may receive the truth you skilfully present to him: but if you impugn his motives, you offend him — you provoke him — you do not leave him the quiet necessary for listening to you with attention: he becomes opposed to you: the fire communicates from one to another — his friends make common cause with him, and oftentimes resentments, which are prolonged beyond the debates, carry into political opposition all the asperity of personal quarrels. It is not enough to exclude personalities: it also is proper to proscribe all violent and bitter expressions; it is proper to proscribe them as signs of awkwardness, still more than as traits of passion.

All who have watched political assemblies know that improper expressions are the sources of the most tumultuous incidents and of the most obstinate wanderings.*

4. *Never mention the wishes of the sovereign or the executive power.*

This wish in itself proves nothing in regard to the fitness or unfitness of the measure: it can have no good effect, and can only be productive of evil.

The admission of this instrument would be incompatible with the liberty of the assembly, not only upon the particular occasion but upon every other; for if it may be alleged at one time, it will be alleged at all times; and if the least value be granted to a consideration of this nature, the power of the assembly is reduced to nothing: there is substituted for its will, the will of a superior.

If this wish, when announced by one party, should be disputed or condemned by another party, it would follow that the head of the executive power would become the personal object of the debates — that its dignity would be compromised; and there would result a most fatal species of discord — that which leads on to civil war.

This rule has been long established and strictly followed in the parliamentary debates. The king's speech at the opening of the ses-

* Mr. Fox, the most distinguished orator of England, who attacked his adversaries with so close a logic, carried to the highest pitch the art of avoiding everything which might irritate them. In his most animated moments, when he was as it were borne onward by the torrent of his ideas, always master of himself, he was never wanting in the most scrupulous regard to politeness. It is true, that this happy quality was in him less a secret of the art of oratory, than the effects of the benevolence of his character — modest amidst its superiority, and generous in its strength. Still, however, no man ever expressed himself more courageously, or less ceremoniously. "*Les mots allaient*," as says Montaigne, "*ou allait la pensée*."

sion only contains general recommendations; and besides this, it is only considered as an act of the minister. It is therefore freely discussed without mention of the king, and the opposition attack it as they do any other ministerial measure.

5. *Never quote any justificatory piece, or means of proof, which has not been presented to the assembly in consequence of a motion made to that effect.*

Omnis demonstratio ex præcognitis et præconcessis.

This rule is founded upon two manifest reasons: —

1. To secure the authenticity of the matter which is taken as a foundation for the decision.

2. To give every member an opportunity of being acquainted with it, and informed of the use which it is desired to make of it.

In consequence of neglecting this rule, the highest bodies in the state in France have sometimes fallen into errors with which the lowest official persons cannot be reproached in England. The parliament of Paris, in its famous remonstrances of the 16th and 24th July 1787, enumerated Charles V. and Henry IV. among the kings who had assembled the States-General, which is not true either of the one or the other.*

How often has the National Assembly passed decrees upon mere hearsay — upon facts said to be of public notoriety! — without thinking that there is nothing more deceitful than popular rumour, and that the more widely a fact was known, so much the more easily might proof be collected of it.

The legislative assembly transmitted articles of accusation against M. de Lessart to the high national court, which contained only vague and declamatory imputations, without stating a single fact, and without having heard the accused.†

6. *Do not permit any motion which has been rejected, to be presented afresh during the same session, or before an interval [of three months.]*

This rule has for its object the repression of the obstinacy of parties, which would never leave off repeating questions which had been already decided against them, either from a hope of thereby keeping up the zeal of their partisans, or from a desire to embarrass the operations of the assembly.

This rule can only be strictly applied to motions which are identical. A party will never allow itself to be restricted by the prohibition to reproduce its motion. If it see any chance of success, it will not fail to present it again under a new form.

It is, however, always well to insert this article in the regulations. It will follow from it in ordinary cases, that a motion once rejected will not reappear in the same session.

A rule which should permit the definitive rejection of motions without return, would be the greatest possible attack upon liberty: it would be to seek to enchain one's self or one's successors.

§ 6. *Of the Election of Debaters.*

I proceed to point out a mode of reducing the number of orators, in an assembly too numerous to allow the right of discussion to all.

It would, however, only be applicable to democratic constitutions; for with good regulations, six hundred persons at least might exercise the right of speaking without any occasion to limit it to a certain number.

The most simple method would be to elect in the first instance, twenty-four orators by name; 2dly, To choose one hundred other persons by lot, in order to give a chance to all parties; 3dly, To permit each of these to waive his right in favour of any other member of the assembly at pleasure. Those who did not possess the talent or inclination to speak, would then voluntarily surrender their places to such members of their own party as seemed best fitted to fill them. But it would be proper to reserve for all the members the right of making a motion — that is to say, a principal motion — and of explaining it.

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* This fact is drawn from L'Histoire du Gouvernement François, p. 147.

† Every nation has its weakness and its endemic imperfections; and the greater the empire they have obtained, the greater the importance of knowing and guarding against them. Of all the faults with which French writers can be accused, inexactitude is the most marked — the most incontestible. If the English nation has any decided advantage over its rival, it is in the quality opposed to this defect that its cause should be sought for.

An historical work without authorities would be received in England very nearly as a plea without proofs, or as a romance. But in France, a great number of historians have considered it unnecessary to give references to original authorities: the condition they impose upon their readers is to believe them on their word. But if the author had the original documents before him, why did he not cite them? Is it more difficult to make a reference than an extract? What reliance can be placed upon his judgment, if he have not felt that the confidence he demanded depends upon this exactitude? And if it arise either from negligence or trifling, that he has refused the labour necessary for furnishing his proofs, may it not with much stronger reasoning be presumed that he was incapable of taking the pains necessary for acquiring them?

There is a kind of maxim proverbial in France, that it is proper to regard the meaning without weighing the letters — without quarreling about the words; — as if the meaning did not depend upon the words — as if correct ideas were not produced by correct words. This pretext is the resource of feeble and careless heads, which would be thought strong; for there is no defect which has not attempted to employ itself as a mask.

CHAPTER XII.

OF AMENDMENTS.

AT first sight, it would appear scarcely possible to class amendments, since they may embrace every modification which the human mind can conceive with respect to a given motion. Upon calling analysis, however, to our assistance, we shall discover that this difficulty vanishes.

All amendments are necessarily relative to *the choice of terms*, or to *the mode of their connexion*.

Amendments which relate to terms, can only have for their object one or other of these three objects — to suppress, to add, or to substitute. This last operation is effected by the union of the two first.

Amendments with reference to the connexion of ideas, can only have for their object — their *division*, their *union*, or their *transposition*.

Does the original proposition appear to me too complicated? I demand that it be divided, with the intention of allowing the assembly the power of rejecting one part, without rejecting the other.

Does it appear proper that two propositions which are separated in the original project, should be considered together, or one following the other? I demand their union.

Amendments which consist in transposing a certain word or phrase may have the effect of entirely changing the project: the word *only*, for example, placed in different situations, will produce a meaning totally different.

Amendments are thus reduced to six kinds, and are capable of receiving clear and precise denominations: —

Amendment { Suppressive. / Additive. / Substitutive.

Amendment { Divisive. / Unitive. / Transpositive.

These technical terms appear necessary to prevent the confounding of ideas which only differ from each other by very slight shades. Things which are not classified, and which have no proper names, are always ill understood, and cannot be designated but by periphrases which are often obscure.

A proper name is a great assistance to the understanding, to the memory, and to the communication of ideas. The greatest difficulty which can be alleged against new words is, that they are difficult to be understood; but those derived from more familiar terms are perfectly intelligible.

It frequently happens, that many amendments are offered upon one motion, and even amendments which refer to a previous amendment: this is what is called a *sub-amendment*. In what order ought they to be discussed? It is very difficult to give positive rules in this respect: each party will support the importance of his own, and seek to obtain priority. If a debate were always necessary to decide the matter, the principal question would be lost sight of, and the attention of the assembly exhausted upon these accessories.

These contests may be rendered more rare and short, by laying down as a general principle, that amendments upon the *connexion* shall always be taken into consideration first. What is their object? To place the objects to be discussed in the most suitable order: but this order, once formed, is that which most tends to produce a good discussion. Among this class of amendments, the divisive ought to have the priority. Complex questions are the occasion of the most obscure and obstinate debates.

Among amendments as to the *choice of terms*, it might also be laid down as a general principle, that *suppressive* amendments ought to have the priority over the two others of the same kind. The suppression of a single term may remove the strongest objections, and that which is omitted is no longer the subject of debate: on the other hand, additive or substitutive amendments may be productive of sub-amendments of the same species.

The value of these observations will only be fully apprehended by those who have had experience in political assemblies. They will be aware how much confusion is produced by multiplied amendments, and how happy it would be, if without absolute rules some thread could be found which would lead out of the labyrinth

There remain many more difficulties upon this subject. When there are many additive amendments in concurrence, in what order should they be submitted to the vote? Ought they to be presented singly, or all at once? If they are presented singly, by deciding according to priority you do not give the others an equal chance. It is the same in elections. If you have to choose among many candidates, you do not treat them with equality if you put them to the vote one after another. He who is presented first, will in general have a great advantage; and if he be elected, the others would be rejected without having any chance of success. It is proper, therefore, to vote for rival amendments after the elective manner. I see no other inconvenience than the length of the process. It would be proper always to have recourse to this in cases of great importance. In ordinary cases, it may be allowed to the president to put amendments to the vote in the order

which appears to him most suitable, it being understood, that if objection be made, it belongs to the assembly to decide.

It is scarcely necessary to say that amendments are only trials which ought to admit of every possible variation. If the amendment pass, it does not follow that the clause amended shall be adopted. The motion, thus modified, becomes the object of debate, and may be rejected. That which has been suppressed, may be re-established: that which has been added, may be struck out. Words may be placed and displaced, as in the corrections of style, without deciding upon the value of the composition, which after this labour may be condemned or destroyed.

One rule which ought to be absolute with respect to amendments, is — not to admit any which are insidious.

I call those pretended amendments insidious, which, instead of improving the motion, represent it as ridiculous or absurd, and which cannot be adopted without making the motion fall by means of the amendment itself.

Ridicule is useful for the overthrow of an absurdity which does not deserve to be seriously attacked; but an epigram in the shape of an amendment is a piece of wit which is unbecoming the gravity and the design of a political assembly. To propose an amendment, is to declare that one seeks to improve the motion, that it may become worthy of approbation: to propose an amendment which renders the motion ridiculous, is a species of fraud and insult, resembling that particular kind of impertinence which in society is called *jeering*.

Besides; these insidious amendments are altogether useless. They cannot pass unless the majority of the assembly be already disposed to reject the motion itself. It is therefore to go round about, in order to reach the end which may be attained by direct means. You only render necessary two operations instead of one. You begin by receiving the amendment which renders the motion absurd, and then reject the motion thus amended.

Let us apply these observations to the celebrated vote of the House of Commons in 1782 — a vote which served as the foundation of a kind of revolution in the government: —

"It is declared, that the influence of the crown has increased, is increasing, and that it ought to be diminished."

Let us suppose that one of the opponents of the motion had proposed that it be adopted, upon the insertion of the word *necessary* before influence.

Here would be an example of the amendment insidious; since the insertion of this word would have rendered the motion contradictory, and even criminal; and the amendment having been admitted, the motion ought to be rejected.

Another example: — A motion having been made for the production of all letters written by the Lords of the Admiralty to an officer of marines, — it was proposed to add as an amendment, the words "which letters may contain orders, or relate to orders not executed, and still subsisting." The amendment having been adopted, the whole motion was rejected without a division.

This mode of procedure united both the inconveniences I have mentioned: insult and derision were its object — cunning and tergiversation were its means. It was entirely opposed to the maxim — *suaviter in modo, fortiter in re.*

CHAPTER XIII.

OF DILATORY MOTIONS, OR MOTIONS OF ADJOURNMENT.

A motion made, and its proposer heard, it is lawful for any member, from this moment to the conclusion of the debate, provided he does not interrupt any speech, to propose a dilatory motion; and this shall take precedence of the previous motion.

There are three kinds of dilatory motions: —

Indefinite adjournment.... *(sine die.)*
Fixed adjournment ..... *(in diem.)*
Relative adjournment ..... *(post quam.)*

This latter motion consists in proposing to adjourn till after a future event: for example, till after the discussion of another motion, or of some bill already upon the order-book — or till after the presentation of a report, which ought to be made by a committee, &c. — or a communication from the king, or expected petitions.

All these motions ought to be permitted, in order to secure to the assembly the exercise of its will; which would not be completely free, if any one of these modifications were excluded.

The relative adjournment, or *post quam*, is necessary as a preservative against the danger of coming to an unsuitable decision in the absence of the necessary documents.

Fixed adjournment, or *in diem*, may have the same object, the procuring of new documents upon a question which does not appear sufficiently clear; or it may be for the purpose of arresting a discussion which assumes too lively and passionate a character.

Precipitation may arise from two causes: from ignorance, when a judgment is formed without the collection of all the information required — from passion, when there is not the necessary calm for considering the question in all its aspects.

What may happen to an individual, may

happen to an assembly. The individual may feel, that in the actual conjuncture he is not so sufficiently master of his passion, as to form a prudent determination, but he may be sufficiently so, not to form any —

"Quos ego. Sed motos præstat componere fluctus."
Æn. I. 139.

"I would beat you," said the philosopher to his slave, "if I were not angry."

This faculty, of doubting and suspending our operations, is one of the noblest attributes of man.

These two species of adjournment decide nothing as to the merit of the motion: but to demand an indefinite adjournment, is to cut short the debate by rejecting the motion itself. Ordinarily, the partisans of the original motion will be opposed to this adjournment, and they will employ all the arguments which they can advance in its favour, in opposition to the adjournment. In this case the debate will be less direct, but not shorter. But it may happen that they may themselves favour the indefinite adjournment, if they judge by the complexion of the debate that the chances of success are unfavourable, and that they can attempt their object with more success at a future time.

When an indefinite adjournment is adopted, it is probable that the original motion would have been rejected. The prompt termination of the debate is then an economy of time.

CHAPTER XIV.

OF VOTING.

§ 1. *General Observations.*

THIS subject is both difficult and important. The freedom of an assembly resides in the expression of its will. It is necessary, therefore, so to proceed, that every one may give his vote in conformity with his real wishes, and that in the result we may be sure to have obtained the general wish.

The processes of voting are susceptible of divisions derived from many sources: —

1. Voting upon questions, or voting respecting persons. The first takes place with reference to the adoption or rejection of a motion; the second with reference to the election of a person to an office.

There is no real difference between these two cases. To vote upon an election is to vote upon the question whether a certain individual shall be elected: to vote upon a question, is to vote upon an election whether the project shall be chosen or rejected.

2. A *simple* or a *compound vote.* The simple vote occurs when the question is so reduced that it is only necessary to say *yes* or *no* — such a project shall be adopted, or shall not — such person shall be elected or shall not.

The compound vote occurs, when many operations are to be performed; — when it is necessary to decide among many projects, to choose one person from among many candidates, or to nominate to many places.

With regard to motions, it is proper to reduce the question to the simple form, in which one side may vote by yes, and the other side by no.

With regard to elections, the compound mode is often necessary. When a committee of twenty-four persons is to be chosen from among 1200, there will be 1200 persons eligible for each place, and twenty-four places for each of which it is necessary to choose out of 1200.

3. With reference either to motions or elections, the votes may be given *secretly* or *openly:* the secret mode is called ballot.

4. The mode employed for obtaining a decision, may be either *dependent* or *independent* of human will. Hence a new distinction — election by *choice* — election by *lot.*

5. In conclusion, there is also regular and summary voting. In the regular mode, all the votes are counted, and the exact number on each side known: in the summary mode, the president puts the question, and calls upon the assembly to express its will by sitting down or rising up, or by holding up the hand, &c.; the president judging which party has the majority, and his decision being valid, unless objected to.

§ 2. *Of open and secret Voting.*

In general, it is very desirable that the voting should be open rather than secret.

Publicity is the only means of subjecting the voters to the tribunal of public opinion, and of holding them to their duty by the restraint of honour.*

This supposes that publicity is in accordance with the public welfare.

In general, this supposition is well founded. The opinion formed by the public is always conformable to what appears to be its interest; and in the ordinary course of things it sees its own interest, whatever it may be. It is always opposed to misconduct; it always respects the probity, the fidelity, the firmness of its governors and judges.

Still, however, the opinion of the public may be incorrect, since all the members of this tribunal are men. If there be measures upon which the wisest men are not agreed, how is it possible that the public should agree, who are not all wise? If there be errors in morals and legislation, which have led the noblest minds astray, how can the multitude, over whom prejudices have so great an empire, be secured?

It may therefore be said, that in those cases in which public opinion is erroneous, it is

* See Chap. II. *Of Publicity.*

desirable that the legislators should vote in secret, that they may be withdrawn from unjust censure, and rendered more free in their votes.

This argument is unsound: for upon what is it founded? Upon the presumption that the opinion of a small number is more correct than the united opinions of a large number. This may be true; but a wise and modest man will be always unwilling to attribute to himself this superiority over his fellows — to pretend to make his opinion triumph over the general opinion. He will choose rather to submit his opinion to that which generally prevails in the nation, and especially will he not desire a victory obtained by clandestine votes, of which he knows the danger.

It follows, therefore, that recognizing the fallibility of the public, it is proper to act as though it were infallible; and that we ought never, under pretence of this fallibility, to establish a system which would withdraw the representatives of the public from its influence.

But may it not be apprehended that this publicity will render men too feeble — that is to say, disposed to sacrifice their real opinions to the general opinion? No: this plan tends in the long run to give greater strength and elevation to their characters. Experience will soon disclose the great difference between the opinion which arises out of a particular circumstance, and that which is formed after mature reflection — between the clamour of the multitude, which is dissipated in noise, and the enlightened opinion of the wise, which survives transitory errors. Freedom of opinion conciliates the respect even of those whom it opposes, and mental courage is no less honoured in free states, than military bravery.

It is, therefore, in a correct knowledge of public opinion, that the means must be found for resisting it when it is considered ill founded: the appeal lies to itself — as from Philip misinformed, to Philip correctly informed. It is not always according to public opinion that an enlightened and virtuous man will decide, — but he will presume, in consulting general utility, that public opinion will take the same course; and there is no stronger moral probability in a country where discussion is free.

Such are the principles which may be advanced for the establishment of the general rule with regard to the publicity of voting.

This rule must be subject at all times to widely extended exceptions.

The cases in which publicity would be dangerous, are those in which it exposes the voters to the influence of *seductive* motives more powerful than the tutelary motives which it furnishes.

In judging whether a motive ought to be referred to the class of *seductive* or *tutelary* motives, it is necessary to examine whether, in the case in question, it tend to produce more good or more evil — whether it tend to favour the greatest or the smallest number.

If, for example, a nobleman be called to decide between his own personal interest and the interest of the body of the nobility, — the motive, whatever it may be, which leads him to prefer this interest to his own, deserves to be called *tutelary*. If this same nobleman be called to decide between the interest of the body of the nobility, and that of the total mass of the citizens, — this same motive loses its tutelary quality, and can only be considered as a seductive motive.

Hence *l'esprit de corps*, a *social* principle, when it leads to the sacrifice of the interest of the individual to that of the particular society, becomes *anti-social* when it leads to the sacrifice of the great interests of the public.

The same observation is applicable to friendship. If this motive lead me to serve my friend at the expense of my own interest, it is social and tutelary: if it lead me to serve him at the expense of the general good, the same motive becomes anti-social and seductive.

From these considerations, it is proper to add to the general rule respecting publicity, a limiting clause: —

Votes ought to be given secretly in all cases in which there is more to fear from the influence of particular wills, than to hope from the influence of public opinion.

What are these cases? To answer this question, it is necessary to distinguish two species of interest: the one *factitious* — the other *natural*.

Interest is purely factitious when the voter has nothing to gain or to lose in consequence of his vote, except when his vote is known.

Interest is natural when the voter may lose or gain in consequence of his vote, even should it remain unknown.

For example, the interest which results from the contract whereby I engage to sell my vote to a stranger, is a factitious interest.

Secret voting destroys the influence of factitious interest: it has no effect upon the influence of natural interest.

Under the régime of secresy, the buyer could have no sufficient security that the contract would be faithfully executed by the seller: an individual may be sufficiently dishonest to commit a fraud, but not to commit treason: the lesser crime is always more probable than the greater.

The system of secresy has therefore a useful tendency in those circumstances in which publicity exposes the voter to the influence of a particular interest opposed to the public interest.

Secresy is therefore in general suitable in elections. Are the votes given openly? — no

one can tell to what extent friendship, hope, or fear, may take away the freedom of voting.

It would be a great evil, if in elections, especially popular elections, the effect of secresy were to destroy all influence. This idea of absolute independence in the voters is absurd. Those whose situation does not permit them to acquire political knowledge, have need of guidance from more enlightened persons; but happily the secret mode of election does not diminish the influence of mind on mind: all other things being equal, the most deserving individual in elective assemblies will have the ascendency over the more obscure member;— the man distinguished by his services will have more votes than he who does not rise above the common level. The opulent proprietor, the employment of whose fortune presents a spectacle to the observation of the multitude, will be more readily taken as a model for imitation, than the individual who moves in a narrower circle. This preponderance of the aristocracy is as natural as it is just and necessary. The advantages of wealth and rank suffice, in case of equilibrium in other respects, to turn the balance: but if the one of the candidates had exposed himself to public contempt, whilst the other, rising from obscurity, had acquired the general favour, the illusion would be broken; — and if the votes were free, merit would be preferred to fortune.

It is proper to observe, that the secret mode does not prevent those who desire it, from making known their sentiments. A constrained and universal secresy in elections would be a bad measure: this servile silence would be in contradiction to freedom of action. Each candidate ought to have his friends — his defenders — to cause his claims to be duly estimated by the assembly, to dissipate false imputations — in a word, to enlighten the decision of his judges. Since to proceed to an election is to proceed to try the candidates with the intention of bestowing a reward, — to exclude previous *vivâ voce* discussion, is to decide the cause of the candidates and that of the public, without allowing the interested parties an opportunity of being heard.

It is true that these public debates — these manifestations of party — may sometimes, in popular elections, produce a tumultuous ferment; but this is a small evil, compared with that of restraining the expression of the public feeling. It is by this freedom that the people are interested in persons and things, and that the firmest bonds are formed between the electors and the elected. Even in England, where these periods rarely return, the fear of this species of popular assize exercises a marked influence over those who devote themselves to the career of politics.

With this mixture of publicity, secret voting appears to me, then, most suitable for elections; that is to say, the most suited to prevent venality, and to secure the independence of the electors. In political matters, I do not see any other case in which it can be recommended as a general rule. But it is proper to observe here, that a nation may find itself in particular circumstances, which will demand the same system upon other points. It may be, for example, that at the period when secret suffrages were introduced at Rome the change was desirable. Cicero thought otherwise.

The adoption, however, of one of these methods, does not exclude the other. There are cases in which it is advantageous to combine them, by making them follow upon the same question. The result of these two operations, whether they coincide or whether they differ, would always furnish very instructive indications.

I find a very singular example in the latter days of Poland, when she made a last and generous effort to withdraw herself from the dominant influence of Russia.

The permanent Council, the depositary of the executive power, exercised the supreme power during the interval of the Diets: this Council, intimidated or corrupted, was only the instrument of the will of Russia. It was proposed to raise an army to cause the territory to be respected, — it was proposed to place this army under the orders of a commission, independent of this Council. On the 16th October 1788, they voted upon this proposition: — publicly collected, the votes showed a majority of 80 against 60 for the negative. The secret vote reduced this majority to 7.*

On the 3d of November, the same proposition was discussed again: — the open vote gave for the independence of the commission 114, against it 148; but the secret vote turned the majority on the other side — for the independence 140, against it 122. Thus, among 262 votes, this change of method had made a difference of 52.†

When secret voting is established, it ought only to be when circumstances render a hidden influence suspected; and even then, it is proper that it should be preceded by open voting. Publicity ought to be the ordinary plan.

Secresy ought only to be admitted as a kind of appeal. To demand a ballot, is to appeal from the apparent to the real wish of the assembly.

To take the opposite direction — that is to say, to proceed from secret voting to open voting — would be wrong. The natural order is to pass from the false, or what is suspected

* Courrier de l'Europe, 22d Nov. 1788.
† Gazette de Leide, 5th December 1788.

to be false, to the true. The real wish once ascertained, what good purpose would be served by taking another vote, which would not be the real vote if it differed from the former?

That these two methods may have their highest effect, they ought to be carried to the highest possible pitch. In secret voting, the secresy cannot be too profound: in public voting, the publicity can never be too great. The most detrimental arrangement would be that of demi-publicity — as if the votes should be known to the assembly, and should remain unknown to the public. Individuals would thus be exposed, in all their votes, to every seductive influence, and would be withdrawn from the principal tutelary influences. This is the system which it would be proper to establish, if we would secure punishment to probity, and reward to prevarication.

In governments in which there are public assemblies, acting in conjunction with a powerful monarch whose influence is feared, it has been thought that the secret mode ought to be the ordinary plan, that the members might be withdrawn from the factitious interest which the monarch might create by his threats or his rewards.

If the monarch can act upon the assembly by means of force, imprisonments, or depositions,—security does not exist—liberty is but a name. The intimidated members would find in secret voting an asylum against public opinion.

In relation to the modes of seduction, those which are public may be arrested by laws excluding from the assembly those individuals who hold certain employments at the nomination of the sovereign.

With regard to clandestine favours, or what may be called corruption, — the danger can never be equal, in a numerous assembly, to the grand antiseptic effect of publicity. The number of persons who could be reduced to dependence by such means will never be large: the majority will be restrained by the dread of shame; a still larger number by the fear of being removed in an assembly liable to change.

Should a sovereign grant perpetual favours,— he would most frequently purchase ingratitude. Should he grant his favours periodically, — these secret negotiations would be too disgraceful and perilous to be frequent. Does one kind of honour enjoin the observation of a clandestine bargain? — another kind of honour directs the breach of it, at least in the case when it cannot be observed without openly offending public opinion.

§ 3. *Of summary and distinct Voting.*

Every numerous political assembly which has many operations to perform, has soon been led, by the necessity of economizing time, to ascertain its votes in a summary manner — contenting itself with knowing them by approximation in cases in which the result is manifest, or in which it is not of importance to ascertain the respective numbers with precision. This is the case with regard to the greater number of motions relative to current affairs.

It is better to takes the votes by a visible sign, rather than by acclamation, especially if the assembly be numerous: the sense of sight is a more correct judge than that of hearing. The raised hands, or the persons standing up, are always distinct: voices are more easily mistaken. Are the proportions doubtful? — the operation by standing up and sitting down may be repeated or prolonged without inconvenience: prolonged or reiterated exclamations would be equally ridiculous and inconvenient.

Besides, the voice is a deceptive witness: strength of lungs or party feeling may give to a small number an apparent majority, or at least render the result more often doubtful, and distinct voting necessary.

Acclamations ought to be avoided for another reason: they have a contagious quality, which tends to inflame the mind, and to produce quarrels. In matters which excite a lively interest in the parties, they are a sort of *war-cry*.

The plan of rising and sitting down discovers the voters — the plan of acclamation hides them in a crowd: it may be employed for stifling all opposition, for oppressing liberty, and causing falsehood to triumph.

Indeed, to say that anything has passed by acclamation, is to wish to make it be believed that it has passed unanimously; but if this unanimity were real, more would be gained by proving it by distinct voting.

The votes should not be taken successively, but all at once, as far as it is possible.

Reference is here made to those cases in which the votes are taken openly. This mode of taking the votes simultaneously is not only recommended as summary — it is also recommended as tending to weaken the influence of party and authority, at least in those cases in which there has been no pre-concerted arrangement.

Distinct or regular voting is that in which all the votes are taken and counted: — this operation is called *dividing* the assembly.

It may be effected by various methods: by lists, upon which each member inscribes his vote — or by counters — or by a simple change of place on the part of the voters. The choice depends on circumstances, or the nature of the assemblies. Precautions ought to be taken against all possible frauds, either on the part of the voters, lest they should give many votes; or on that of the scrutineers, lest they should falsify the votes.

Each member ought to have the right of demanding it by a simple formula delivered to the president, — *I require the division.** For it is not proper to deprive any member of the right of knowing whether the decision be really conformable to the wish of the assembly, or of that of appealing to public opinion, by making known those who vote for or against a measure.

He who demands a division can only have the one or other of two objects in view. Is the disproportion manifest? — he desires to make known the relative force of the two parties — or he wishes to subject the voters to the law of publicity. In this case, it is a species of appeal to the people against the decision of the majority — or, to speak more strictly, it is a demonstration of the votes.

If this privilege were abused by the frequency of divisions for slightly important objects, it might be remedied by requiring the concurrence of a certain number of individuals in a requisition for distinct voting. But such an abuse is scarcely probable. One individual would not often desire to divide the assembly solely to show that he alone was opposed to all the rest.

The mode used in the House of Commons appears to me liable to several inconveniences.

All business is suspended — the assembly is in a state of confusion, whilst the account is taken of the votes of those who leave the House, and of those who remain. This tumultuous movement of parties, and this interruption, which often last half an hour, has none of the dignity which ought to characterize a legislative assembly.

But this is the least evil. As this derangement is agreeable to no one, a regular division is often foregone in order to prevent the inconvenience; and as it is particularly disagreeable to those who are subjected to temporary expulsion, it is often a subject of controversy to determine upon whom the inconvenience ought to fall. For determining this controversy, a rule has been required; but this rule itself has furnished a crop of the most abstruse metaphysical questions: a volume might be filled with the difficulties which have arisen from this branch of parliamentary jurisprudence. This great assembly has been occupied in discussing points altogether as clear in themselves as the famous question of the schoolmen: *Utrum chimæra bombilans in vacuo posset comedere secundas intentiones.*†

These useless creations of science have for their common effect the restraint of liberty and the concealment of truth. The majority of individuals recoil with affright from the aspect of this labyrinth, and allow themselves implicitly to be led by those who are willing to purchase, at the price of a dry and disgustful study, the privilege of domination. Here, as elsewhere, mystery opens the door to imposture.

To create the world out of nothing was the work of divine power: to create a science out of nothing, and for nothing, has often been the employment of human folly.

From a train of these subtleties, one circumstance still more extraordinary has arisen in English voting: it is, that a member may be forced to vote against his will, and that the legislative assembly should commit an act of falsehood. If the members have, from inattention or any other circumstance, neglected to go out before the door is shut, it is no longer at their option to vote as they wish — they are counted as voting with those who remain in the House, although it be known that their vote is contrary to their known and avowed inclination. — *Hatsell*, Edit. 1818, II. 195.

This mode of voting is an ancient custom, established when printing was not invented, and when the art of writing was not common. In ancient Rome, the Senate voted nearly in the same manner: — "*Manibus pedibusque descendo in sententiam vestram.*"‡

I shall only say one word concerning the French practice — it has been spoken of elsewhere. In the National Assembly, the summary mode takes place by *sitting* and *standing*. The regular mode takes place by *calling over the names* — a method so long, so fatiguing, so

* The form used in the House of Commons is not so simple, nor so conformable to truth. The Speaker declares the majority in favour of the *ayes* — *The ayes have it.* It is necessary, in order to divide the House, that a member of the other party should deny the truth of this report, and say, *The noes have it*, even in the case when he may be found voting alone in opposition to hundreds. I am well aware that this assertion, founded upon ancient usage, is neither understood as giving the lie to the Speaker, nor as expressing the opinion of him who makes it. But wherein consists the propriety or utility of a legislative assembly employing a form which, beside other inconveniences, is everywhere else an indecorum and a lie?

† The general rule which has served as the foundation of all this ridiculous science is, "That those that give their votes for the preservation of the orders of the House, should stay in; and those that give their votes otherwise, to the introducing of any new matter, or any alteration, should go out." — *Journals of the House of Commons*, 10th December 1640; Hatsell, Edit. 1818, II. 187.

‡ The inutility of this form is clearly shown by the circumstance, that when the same individuals in the same number call their assembly a committee of the whole House, this expulsion does not take place. In this case, they have discovered that the two sides of the House are as sufficient to mark the separation of the two parties, as two different rooms. It may perhaps happen in the long run, that they will profit by this discovery.

little favourable to individual independence, that one is almost tempted to believe that the governing party has preserved it as a means of intimidating the weak. It is true, that silence is imposed upon the galleries — that signs of approbation or disapprobation are prohibited: but the sovereign people often mutiny against these prohibitions.

In regular voting, every member ought to be required to give his vote. This obligation is founded upon the nature of his office, as we have seen more in detail in treating *of absence*. He cannot, as appears to me, neglect this duty, except from indifference, pusillanimity, or corruption.

"No," says a wise man, "I shall not vote because I am not sufficiently enlightened upon the question: I am equally afraid of error in declaring myself for or against."

Indecision is a possible state. The mind is as susceptible of this modification as of the two others. To require an affirmative or negative answer from a man who is in doubt, is to substitute constraint for liberty — is to oblige him to tell a lie. The ancient Romans, in penal matters, had seized the distinction of these three states of the mind, and had found formulas for their expression: *absolvo — condemno — non liquet*. The jurisconsults and legislators, who have drawn so many absurd and atrocious laws from Roman jurisprudence, have never thought of adopting this simple arrangement — this religious homage to truth.

I propose, therefore, a new form of voting. There have hitherto been only two lists, or two ballots — the one for the *ayes*, the other for the *noes*; I would establish a third, for the *neuters*.

But it may be asked, why require a man to vote, whilst he is permitted to give a vote which will have effect neither on the one side nor the other?

It is replied, that a *neuter* vote subjects the individual who gives it to the judgment of public opinion. By abstaining from voting, he may escape observation, or he may excuse himself upon divers grounds. But admit a *neuter* vote in a case in which the public interest is manifest, the voter cannot withdraw himself from censure — it will exhibit either his crime or his incapacity in as clear a manner as if he had decidedly taken the wrong side.

In cases which admit of honest doubts, the number of neuter votes would serve to enlighten the assembly, by showing that its deliberations had not yet reached maturity.*

* It would seem that this form, very applicable to *facts*, is less so to the *making of laws*. He who is undecided ought to be for the negative, for he sees no sufficient reason for making the law.

CHAPTER XV.

OF COMMITTEES.

§ 1. *Of Special Committees.*

The more numerous an assembly is, the less is it fitted for certain labours. By dividing itself into committees, it multiplies itself — it resolves itself into many parts, each one of which is better calculated to attain a certain object than the whole body would be.

Each committee may be engaged with a different matter. The labour is distributed — progress is accelerated — a degree of attention may be given to all the details of each new project, of which a large assembly would be incapable. This formation of committees, or *bureaux*, is absolutely necessary for the collection of documents — for engaging in those preparatory researches which require that a great number of persons should be heard — for the verification of accounts, — &c. &c.

It is there frequently that the preparation of a law is completed — a species of labour for which a large assembly is very ill adapted, and which, if attempted in such an aseembly, would be attended with a considerable loss of time.

Ought these committees to be named for the whole session, or upon each occasion The correct answer will depend upon the circumstances and the object in view. In matters of finance, of commerce, of political economy, there will be in a permanent committee greater coherency in their proceedings, more experience and special knowledge.

Occasional committees have the advantage of being composed of members who, having made the object in question their particular study, may be considered as better acquainted with it; and who, as they are only charged with a single operation, may give more application to it, that they may better justify the choice of the assembly.

The great difficulty lies in the manner of naming committees. The best mode, perhaps, would be to begin by a free nomination — each member being allowed to name a certain individual as a candidate, and from this list to make nomination according to the relative majority of suffrages.

If *doubtful, wait*, — is more applicable to matters of legislation than to any others.

Should the neuters be the greater number, what ought to be done? Ought not indecision in this case to have the force of a negative?

In a general committee, the *neuter* vote might be admitted for the purpose of better judging whether the deliberation ought to be continued or adjourned: but it is not necessary: the motion for adjournment supplies its place. All who are undecided have only to support it, in order to obtain leisure for the acquisition of new information.

But whatever may be the merit of these committees, it is not proper that the assembly should so far rely upon them, as to dispense with any one of its opportunities of debate. By so doing, it would be in danger of insensibly transferring the power of the whole body to a small body of individuals, naturally exposed to secret influences.

§ 2. *Of Committees of the whole House.*

In relation to all legislative measures, the two Houses of Parliament are accustomed to resolve themselves into Committees of the whole House, that there measures may be discussed more freely than in the course of a regular debate. The following are the points of difference between these two methods: —

IN THE HOUSE.	IN COMMITTEE.
1. The motion or bill is considered as a whole.	1. The motion or bill is considered article by article.
2. A member can only speak once, except for purposes of explanation.	2. Upon each article each member may speak as often as he pleases.
3. The Speaker is the president in the House.	3. The Committee has its own president, chosen for the occasion.
4. Each motion requires to be seconded.	4. A motion does not require to be seconded.
5. Upon a division, one of the parties remains in the House, the other goes into the lobby.*	5. Upon a division, the two parties go to different sides of the House.
6. The motion may be avoided, by moving the previous question.	6. The previous question is not admissible.

Some of these distinctions appear useful; others are altogether arbitrary: —

1. It is highly proper that bills and motions composed of a series of articles, should undergo two different discussions — first as a whole, and afterwards article by article. This subject has already been considered in Chapter XI. § 3, "*Of three Debates.*"

2. It is highly proper, that upon important subjects there should be two forms of debate: the strict debate, in which each member may speak, but speak only once — and the free debate, in which he has the liberty of replying.

3. With regard to the change of the president, the inconveniences of allowing the president of the assembly to take part in its discussions have been elsewhere pointed out: he is a judge, and as a judge ought not to be exposed to the danger of being infected with party spirit.

* Upon a division, both parties now leave the House. — *Ed.*

CHAPTER XVI.

OF FORMULAS.

FORMULAS are models of what ought to be said upon each occasion by the individual to whom it is prescribed that he should express himself in a certain manner. It can scarcely be determined beforehand, how many formulas an assembly may require: they will be many or few, according to the number of the members, and according to the nature of its powers.

It is proper, for example, that the president always take the votes in the same manner, employing the same expressions — that the members make use of the same terms in presenting their motions, in requiring the exercise of any of their rights, — &c. &c.

Everything unnecessary in such formulas is pernicious. *Clearness* and *brevity:* — such are the essential qualities: to attempt to ornament them at the expense of precision, is to disfigure them.

Formulas not only save words: they have a superior utility — they prevent variations which may have a concealed object — and, above all, they prevent disputes.

In England, the royal sanction is always expressed by the same words: *Le Roi le veut;* and if he reject a bill, the formula of refusal is equally determined: *Le Roi s'avisera.*

Judicial formulas have too often merited the reproach which has been almost everywhere thrown upon them, of being at the same time vague and prolix — of sinning by omission and by excess.

Their prolixity is easily accounted for in all cases in which lawyers have been able to find, in the multiplication of words, a pretext for their services, and the increase of their price. And when the spirit of revenue has been introduced into procedure, and a traffic has been made of words, increase of length has been given to the formulas, that more profit might be derived from them.

It has in certain cases been thought right to proportion the number of words to the importance of the subject. To dismiss a grave matter in two or three words, it has been considered, was not to form a sufficiently high idea of it — not to treat it with a sufficient dignity. This is the error of a little mind. The most sublime thoughts are often expressed by a single word.

THE

BOOK OF FALLACIES:

FROM

UNFINISHED PAPERS

OF

JEREMY BENTHAM.

EDITED BY A FRIEND.

(ORIGINALLY PRINTED IN 1824.)

PREFACE

BY THE

EDITOR OF THE ORIGINAL EDITION.

THE substance of this treatise, drawn up from the most unfinished of all Mr. Bentham's Manuscripts, has already been published in French by M. Dumont; and considering the very extensive diffusion of that tongue, the present work, but for one consideration, might seem almost superfluous.

The original papers contain many applications of the writer's principles to British institutions, and British interests; which, with a view to continental circulation, have been judiciously omitted by M. Dumont.

To the English reader, the matter thus omitted cannot but be highly important and instructive. With the view of enabling him to supply the deficiency, and to obtain separately a treatise of general importance, which in the French work has somewhat unfortunately been appended to one of more limited interest, — namely, that on the mode of conducting business in Legislative Assemblies, — the Editor has made the present attempt.

To have done justice to the original matter, the whole ought to have been re-written: this, the Editor's other pursuits did not allow him leisure to accomplish, and he has been able to do little more than arrange the papers, and strike out what was redundant. In preparing the work for the press, Mr. Bentham has had no share; — for whatever, therefore, may be esteemed defective in the matter, or objectionable in the manner, the Editor is solely responsible. Still, he thought it better that the work should appear, even in its present shape, than not appear at all; and having devoted to it such portion of his time as could be spared from the intervals of a life of labour, he hopes he shall not be without acknowledgment, from those who are competent to appreciate the value of whatsoever comes from the great founder of the Science of Morals and Legislation.

M. Dumont's work contains an examination of the declaration of the Rights of Man, as proclaimed by the French Constituent Assembly. This forms no part of the present volume, to the subject of which, indeed,—Fallacies employed in *debate*,—it is not strictly pertinent. But in fact, the original papers have been mislaid, and they seemed to lose so much of their spirit in a translation from the French, that the contents of the additional chapter would not compensate for the additional bulk and expense of the book.*

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* The original papers above referred to having been recovered, they will immediately follow the present work in this collection.

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THE

BOOK OF FALLACIES.

INTRODUCTION.

SECTION I.

A FALLACY, WHAT.

By the name of *fallacy*, it is common to designate any argument employed, or topic suggested, for the purpose, or with a probability, of producing the effect of deception, — of causing some erroneous opinion to be entertained by any person to whose mind such argument may have been presented.

SECTION II.

FALLACIES, BY WHOM TREATED OF HERETOFORE.

The earliest author extant, in whose works any mention is made on the subject of *fallacies*, is Aristotle; by whom, in the course or rather on the occasion of his treatise on logic, not only is this subject started, but a list of the species of argument to which this denomination is applicable, is undertaken to be given. Upon the principle of the exhaustive method at so early a period employed by that astonishing genius, and, in comparison of what it might and ought to have been, so little turned to account since, *two* is the number of parts into which the whole mass is distributed, — fallacies in the diction, fallacies not in the diction: and thirteen (whereof in the diction six, not in the diction seven) is the number of the articles distributed between those two parts.*

As from Aristotle down to Locke, on the subject of the origination of our ideas (deceptious and undeceptious included,) — so from Aristotle down to this present day, on the subject of the forms, of which such ideas or combinations of ideas as are employable in the character of instruments of deception, are susceptible, — all is a blank.

To do something in the way of filling up this blank, is the object of the present work.

In speaking of Aristotle's collection of fallacies, as a stock to which, from his time to the present, no addition has been made, all that is meant is, that whatsoever arguments may have had deception for their object, none besides those brought to view by Aristotle, have been brought to view in that character and under that name: for between the time of Aristotle and the present, treatises of the art of oratory, or popular argumentation, have not been wanting in various languages and in considerable number; nor can any of these be found in which, by him who may wish to put a deceit upon those to whom he has to address himself, instruction in no small quantity may not be obtained.

What in these books of instruction is professed to be taught, comes under this general description: — viz. how, — by means of words aptly employed, to gain your point, — to produce upon those with whom you have to deal — those to whom you have to address yourself, the impression, and, by means of the impression, the disposition most favourable to your purpose, whatsoever that purpose may be.

As to the impression and disposition, the production of which might happen to be desired — whether the impression were correct or deceptious — whether the disposition were, with a view to the individual or community in question, salutary, indifferent, or pernicious — was a question that seemed not in any of these instances to have come across the author's mind. In the view taken by them of the subject, had any such question presented itself, it would have been put aside as foreign to the subject; exactly as, in a treatise on the art of war, a question concerning the justice of the war.

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* Σοφισμα, whence our English word *sophism*, is the word employed by Aristotle. The choice of the appellation is singular enough: σοφος is the word that was already in use for designating a wise man. It was the same appellation that was commonly employed for the designation of the seven sages. Σοφιστης, whence our *sophist*, being an impretative of Σοφος, was the word applied, as it were in irony, to designate the tribe of wranglers, whose pretension to the praise of wisdom had no better ground than an abuse of words.

Dionysius of Halicarnassus, Cicero, and Quintilian, Isaac Voss, and, though last and in bulk least, yet not the least interesting, our own Gerard Hamilton (of whom more will be said,) are of this stamp.

Between those earliest and these latest of the writers who have written on this subject and with this view, others in abundance might be inserted; but these are quite enough.

After so many ages past in teaching with equal complacency and indifference the art of true instruction and the art of deception — the art of producing good effects and the art of producing bad effects — the art of the honest man and the art of the knave — of promoting the purposes of the benefactor, and the purposes of the enemy of the human race; — after so many ages during which, with a view to persuasion, disposition, action, no instructions have been endeavoured to be given but in the same strain of imperturbable impartiality, it seemed not too early, in the nineteenth century, to take up the subject on the ground of morality, and to invite common honesty for the first time to mount the bench, and take her seat as judge.

As to Aristotle's fallacies—unless his *petitio principii* and his *fallacia, non causa pro causâ*, be considered as exceptions, — upon examination, so little danger would be found in them, that, had the philosopher left them unexposed to do their worst, the omission need not have hung very heavy upon his conscience: scarce in any instance will be discovered any the least danger of final deception — the utmost inconvenience they seem capable of producing seems confined to a slight sensation of embarrassment. And as to the embarrassment, the difficulty will be, not in pronouncing that the proposition in question is incapable of forming a just ground for the conclusion built upon it, but in finding words for the description of the weakness which is the cause of this incapacity — not in discovering the proposition to be absurd, but in giving an exact description of the form in which the absurdity presents itself.

SECTION III.

RELATION OF FALLACIES TO VULGAR ERRORS.

ERROR—*vulgar error*,* is an appellation given to an opinion which, being considered as false, is considered in itself only, and not with a view to any consequences, of any kind, of which it may be productive.

It is termed *vulgar* with reference to the persons by whom it is supposed to be entertained: and this either in respect of their multitude, simply, or in respect of the lowness of the station occupied by them, or the greater part of them, in the scale of respectability, in the scale of intelligence.

Fallacy is an appellation applied not exclusively to an opinion or to propositions enunciative of supposed opinions, but to discourse in any shape considered as having a tendency, with or without design, to cause any erroneous opinion to be embraced, or even, through the medium of erroneous opinion already entertained, to cause any pernicious course of action to be engaged or persevered in.

Thus, to believe that they who lived in early or old times were, because they lived in those times, wiser or better than those who live in later or modern times, is vulgar error: the employing that vulgar error in the endeavour to cause pernicious practices and institutions to be retained, is fallacy.

By those by whom the term *fallacy* has been employed — at any rate, by those by whom it was originally employed — deception has been considered not merely as a consequence more or less probable, but as a consequence the production of which was aimed at on the part at least of some of the utterers.

Ελεγχοι σοφιστων, arguments employed by the sophists, is the denomination by which Aristotle has designated his devices, thirteen in number, to which his commentators, such of them as write in Latin, give the name of *fallaciæ* (from *fallere* to deceive,) from which our English word *fallacies*.

That in the use of these instruments, such a thing as deception was the object of the set of men mentioned by Aristotle under the name of sophists, is altogether out of doubt. On every occasion on which they are mentioned by him, this intention of deceiving is either directly asserted or assumed.

SECTION IV.

POLITICAL FALLACIES THE SUBJECT OF THIS WORK.

THE present work confines itself to the examination and exposure of only one class of fallacies, which class is determined by the nature of the occasion in which they are employed.

The occasion here in question is that of the formation of a decision procuring the adoption or rejection of some measure of *government:* including under the notion of a measure of government, a measure of legislation as well as of administration — two operations so intimately connected, that the drawing of a

* *Vulgar errors* is a denomination which, from the work written on this subject by a physician of name in the seventeenth century, has obtained a certain degree of celebrity.

Not the moral (of which the political is a department,) but the physical, was the field of the errors which it was the object of Sir Thomas Browne to hunt out and bring to view: but of this restriction no intimation is given by the words of which the title of his work is composed.

boundary line between them will in some instances be matter of no small difficulty, but for the distinguishing of which on the present occasion, and for the purpose of the present work, there will not be any need.

Under the name of a *Treatise on Political Fallacies*, this work will possess the character, and, in so far as the character answers the design of it, have the effect of a treatise on *the art of government*; — having for its practical object and tendency, in the first place, the facilitating the introduction of such features of good government as remain to be introduced; in the next place giving them perpetuation — perpetuation, not by means of legislative clauses aiming directly at that object (an aim of which the inutility and mischievousness will come to be fully laid open to view in the course of this work,) but by means of that instrument, viz. *reason*, by which alone the endeavour can be productive of any useful effect.

Employed in this endeavour, there are two ways in which this instrument may be applied: one, the more direct, by shewing, on the occasion of each proposed measure, in what way, by what probable consequences it tends to promote the accomplishment of the end or object which it professes to have particularly in view: the other, the less direct, by pointing out the irrelevancy, and thus anticipating and destroying the persuasive force, of such deceptious arguments as have been in use, or appear likely to be employed in the endeavour to oppose it, and to dissuade men from concurring in the establishment of it.

Of these two different but harmonizing modes of applying this same instrument to its several purposes, the *more direct* is that of which a sample has, ever since the year 1802, been before the public, in that collection of unfinished papers on legislation, published at *Paris* in the French language, and which had the advantage of passing through the hands of Mr. Dumont, but for whose labours it would scarcely, in the author's lifetime at least, have seen the light. To exhibit the *less direct*, but in its application the more extensive mode, is the business of the present work.

To give existence to good arguments was the object in that instance: to provide for the exposure of bad ones is the object in the present instance — to provide for the exposure of their real nature, and thence for the destruction of their pernicious force.

Sophistry is a hydra, of which, if all the necks could be exposed, the force would be destroyed. In this work they have been diligently looked out for, and in the course of it the principal and most active of them have been brought to view.

SECTION V.

DIVISION OR CLASSIFICATION OF FALLACIES

So numerous are the instruments of persuasion which in the character of fallacies the present work will bring to view, that, for enabling the mind to obtain any tolerably satisfactory command over it, a set of divisions deduced from some source or other appeared to be altogether indispensable.

To frame these divisions with perfect logical accuracy will be an undertaking of no small difficulty — an undertaking requiring more time than either the author or editor has been able to bestow upon it.

An imperfect classification, however, being preferable to no classification at all, the author had adopted one principle of division from the situation of the utterers of fallacies, especially from the utterers in the British Houses of Parliament: fallacies of the *ins* — fallacies of the *outs* — *either-side* fallacies.

A principle of subdivision he found in the quarter to which the fallacy in question applied itself, in the persons on whom it was designed to operate; the *affections*, the *judgment*, and the *imagination*.

To the several clusters of fallacies marked out by this subdivision, a Latin affix, expressive of the faculty or affection aimed at, was given; not surely for ostentation, for of the very humblest sort would such ostentation be, but for *prominence*, for impressiveness, and thence for clearness: — arguments 1. *ad verecundiam*; 2. *ad superstitionem*; 3. *ad amicitiam*; 4. *ad metum*; 5. *ad odium*; 6. *ad invidentiam*; 7. *ad quietem*; 8. *ad socordiam*; 9. *ad superbiam*; 10. *ad judicium*; 11. *ad imaginationem*.

In the same manner, *Locke* has employed Latin denominations to distinguish four kinds of argument: — *ad verecundiam*, *ad ignorantiam*, *ad hominem*, *ad judicium*.

Mr. Dumont, who some few years since published in French a translation, or rather a *redaction*, of a considerable portion of the present work, divided the fallacies into three classes, according to the particular or special object to which the fallacies of each class appeared more immediately applicable. Some he supposed destined to repress discussion altogether — others to postpone it — others to perplex, when discussion could no longer be avoided. The first class he called fallacies of *authority*, the second fallacies of *delay*, and the third fallacies of *confusion*: he has also added to the name of each fallacy the Latin affix which points out the faculty or affection to which it is chiefly addressed.

The present editor* has preferred this arrangement to that pursued by the author

* *i. e.* The Editor of the original edition.

and with some little variation he has adopted it in this work.

In addition to the supposed immediate *object* of a given class of fallacies, he has considered the *subject-matter* of each individual fallacy, with a view to the comprehending in one class all such fallacies as more nearly resemble each other in the nature of their subject-matter: and the classes he has arranged in the order in which the enemies of improvement may be supposed to resort to them according to the emergency of the moment.

First, fallacies of *authority* (including laudatory personalities;) the subject-matter of which is authority in various shapes—and the immediate object, *to repress*, on the ground of the weight of such authority, *all exercise of the reasoning faculty*.

Secondly, fallacies of *danger* (including vituperative personalities;) the subject-matter of which is the suggestion of danger in various shapes—and the object, to *repress altogether*, on the ground of such danger, the *discussion* proposed to be entered on.

Thirdly, fallacies of *delay;* the subject-matter of which is an assigning of reasons for delay in various shapes — and the object, to *postpone* such *discussion*, with a view of eluding it altogether.

Fourthly, fallacies of *confusion;* the subject-matter of which consists chiefly of vague and indefinite generalities — while the object is *to produce*, when discussion can no longer be avoided, such *confusion* in the minds of the hearers as to incapacitate them for forming a correct judgment on the question proposed for deliberation.

In the arrangement thus made, imperfections will be found, the removal of which, should the removal of them be practicable, and at the same time worth the trouble, must be left to some experter hand. The classes themselves are not in every instance sufficiently distinct from each other; the articles ranged under them respectively not appertaining with a degree of propriety sufficiently exclusive to the heads under which they are placed. Still, imperfect as it is, the arrangement will, it is hoped, be found by the reflecting reader not altogether without its use.

SECTION VI.

NOMENCLATURE OF POLITICAL FALLACIES.

BETWEEN the business of classification and that of nomenclature, the connexion is most intimate. To the work of classification no expression can be given but by means of nomenclature: no name other than what in the language of grammarians is called a *proper* name — no name more extensive in its application than is the name of an individual, can be applied; but a class is marked out, and, as far as the work of the mind is creation, *created*.

Still, however, the two operations remain not the less distinguishable: for of the class marked out, a description may be given, of any length and degree of complication: the description given may be such as to occupy entire sentences in any number. But a name, properly so called, consists either of no more than one word, and that one a noun-substantive, or at most of no more than a substantive with its adjunct; or, if of words more than one, they must be in such sort linked together as to form in conjunction no more than a sort of compound word, occupying the place of a noun-substantive in the composition of a sentence.

Without prodigious circumlocution and inconvenience, a class of objects, however well marked out by description, cannot be designated, unless we substitute for the words constituting the description, a word, or very small cluster of words, so connected as to constitute a name. In this case, nomenclature is to description what, in algebraical operation, the substitution of a single letter of the alphabet for a line of any length, composed of numerical figures or letters of the alphabet, or both together, is to the continuing and repeating at each step the complicated matter of that same line.

The class being marked out, whether by description or denomination, an operation that will remain to be performed is, if no name be as yet given to it, the finding for it and giving to it a name: if a name has been given to it, the sitting in judgment on such name, for the purpose of determining whether it presents as adequate a conception of the object as can be wished, or whether some other may not be devised by which that conception may be presented in a manner more adequate.

Blessed be he for evermore, in whatsoever robe arrayed, to whose creative genius we are indebted for the first conception of those too-short-lived vehicles, by which, as in a nutshell, intimation is conveyed to us of the essential character of those awful volumes, which, at the touch of the sceptre, become the rules of our conduct, and the arbiters of our destiny: — "The Alien Act," "The Turnpike Act," "The Middlesex Waterworks Bill," &c. &c.!

How advantageous a substitute in some cases — how useful an additament in all cases, would they not make to those authoritative masses of words called *titles*, by which so large a proportion of sound and so small a proportion of instruction are at so large an expense of attention granted to us: — "An Act to explain and amend an Act entitled An Act to explain and amend," &c. &c.!

In two, three, four, or at the outside half a

dozen words, information without pretension is given, which frequently when pretended is not given, but confusion and darkness given instead of it, in twice, thrice, four times, or half a dozen times as many lines.

Rouleaus of commodious and significative appellatives are thus issued day by day throughout the session from an invisible though not an unlicensed mint; but no sooner has the last newspaper that appeared the last day of the session made its way to the most distant of its stages, than all this learning, all this circulating medium, is as completely lost to the world and buried in oblivion as a French assignat.

So many yearly strings of words, not one of which is to be found in the works of Dryden, with whom the art of coining words fit to be used became numbered among the lost arts, and the art of giving birth to new ideas among the prohibited ones! So many words, not one of which would have found toleration from the orthodoxy of Charles Fox!

Let the workshop of invention be shut up for ever, rather than that the tympanum of taste should be grated by a new sound! Rigorous decree! — more rigorous if obedience or execution kept pace with design, than even the continent-blockading and commerce crushing decrees proclaimed by Buonaparte.

So necessary is it, that when a thing is talked of, there should be a name to call it by—so conducive, not to say necessary, to the prevalence of reason, of common sense, and moral honesty, that instruments of deception should be talked of, and well talked of, and talked out of fashion — in a word, talked down, — that, without any other licence than the old one granted by Horace, and which, notwithstanding the acknowledged goodness of the authority, men are so strangely backward to make use of, — the author had, under the spur of necessity, struck out for each of these instruments of deception a separate barbarism, such as the tools which he had at command would enable him to produce: the objections, however, of a class of readers, who, under the denomination of *men of taste*, attach much more importance to the manner than to the matter of a composition, have induced the editor to suppress for the present some of these characteristic appellations, and to substitute for them a less expressive periphrasis.

SECTION VII.

CONTRAST BETWEEN THE PRESENT WORK AND HAMILTON'S "PARLIAMENTARY LOGIC."

OF this work, the general conception had been formed, and in the composition of it some little progress made, when the advertisements brought under the author's notice the posthumous work intituled "*Parliamentary Logic*, by the late William Gerard Hamilton," distinguished from so many other Hamiltons by the name of *Single-speech Hamilton*.

Of finding the need of a work such as the present superseded in any considerable degree by that of the right honourable orator, the author had neither hope nor apprehension: but his surprise was not inconsiderable on finding scarcely in any part of the two works any the smallest degree of coincidence.

In respect of practical views and objects, it would not indeed be true to say, that between the one and the other there exists not any relation; for there exists a pretty close one, namely, the relation of contrariety.

When, under the title of "*Directions to Servants*," Swift presented to view a collection of such various faults as servants of different descriptions had been found, or supposed by him liable to fall into, his object (it need scarce be said,) if he had any serious object beyond that of making his readers laugh, was, not that compliance, but that non-compliance, with the directions so humorously delivered, should be the practical result.

Taking that work of Swift's for his pattern, and what seemed the serious object of it for his guidance, the author of this work occasionally found, in the form of a direction for the framing of a fallacy, what seemed the most convenient vehicle for conveying a conception of its nature: as, in some instances, for conveying a conception of the nature of the figure he is occupied in the description of, a mathematician begins with giving an indication of the mode in which it may be framed, or, as the phrase is, *generated*.

On these occasions, much pains will not be necessary to satisfy the reader that the object of any instructions which may here be found for the composition of a fallacy, has been, not to promote, but as far as possible to prevent the use of it — to prevent the use of it, or at any rate to deprive it of its effect.

Such, if Gerard Hamilton is to be believed, was not the object with Gerard Hamilton: his book is a sort of school, in which the means of advocating what is a good cause, and the means of advocating what is a bad cause, are brought to view with equal frankness, and inculcated with equal solicitude for success: in a word, that which Machiavel has been supposed sometimes to aim at, Gerard Hamilton, as often as it occurs to him, does not only aim at, but aim at without disguise. Whether on this observation any such imputation as that of calumny is justly chargeable, the samples given in the course of this work will put the reader in a condition to judge.

Sketched out by himself, and finished by

his editor and panegyrist,* the political character of Gerard Hamilton may be comprised in a few words: he was determined to join with a party; he was as ready to side with one party as another; and whatever party he sided with, as ready to say any one thing as any other in support of it. Independently of party, and personal profit to be made from party,—right and wrong, good and evil, were in his eyes matters of indifference. But having consecrated himself to party — viz. the party, whatever it was, from which the most was to be got — that party being, of whatever materials composed, the party of the *ins* — that party standing constantly pledged for the protection of abuse in every shape, and, in so far as good consists in the *extirpation* of abuse, for the opposing and keeping out everything that is good — hence it was to the opposing of whatsoever is good in honest eyes, that his powers, such as they were, were bent and pushed with peculiar energy.

One thing only he recognised as being *malum in se*, as a thing being to be opposed at any rate, and at any price, even on any such extraordinary supposition as that of its being brought forward by the party with which, at the time being, it was his lot to side. This was, *parliamentary reform*.

In the course of his forty years' labour in the service of the people, one thing he did that was good: one thing, to wit, that in the account of his panegyrist is set down on that side: —

One use of government (in eyes such as his, the principal use) is to enable men who have shares in it to employ public money in payment for private service: —

Within the view of Gerard Hamilton there lived a man whose talents and turn of mind qualified him for appearing with peculiar success in the character of an amusing companion in every good house. In this character he for a length of time appeared in the house of Gerard Hamilton: finding him an Irishman, Hamilton got an Irish pension of £300 a-year created for him, and sent him back to Ireland: the man being in Dublin, and constituting in virtue of his office a part of the Lord Lieutenant's family, he appeared in the same character and with equal success in the house of the Lord Lieutenant.†

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* Extract from the preface to Hamilton's work: —

"He indeed considered politics as a kind of game, of which the stake or prize was the administration of the country. Hence he thought that those who conceived that one party were possessed of greater ability than their opponents, and were therefore fitter to fill the first offices in the state, might with great propriety adopt such measures (consistent with the constitution) as should tend to bring their friends into the administration of affairs, or to support them when invested with such power, without weighing in golden scales the particular parliamentary questions which should be brought forward for this purpose: as, on the other hand, they who had formed a higher estimate of the opposite party might with equal propriety adopt a similar conduct, and shape various questions for the purpose of showing the imbecility of those in power, and substituting an abler ministry, or one that they considered abler, in their room; looking on such occasions rather to the object of each motion than to the question itself. And in support of these positions, which, however short they may be of theoretical perfection, do not perhaps very widely differ (says Mr. Malone) from the actual state of things, he used to observe, that if any one would carefully examine all the questions which have been agitated in parliament from the time of the Revolution, he would be surprised to find how *few* could be pointed out in which an honest man might not conscientiously have voted on either side, however, by the force of rhetorical aggravation and the fervour of the times, they may have been represented to be of such high importance, that the very existence of the State depended on the result of the deliberation.

"Some questions, indeed, he acknowledged to be of a vital nature, of such magnitude, and so intimately connected with the safety and welfare of the whole community, that no inducement or friendly disposition to any party ought to have the smallest weight in the decision. One of these in his opinion was the proposition for a *parliamentary reform*, or in other words, for the new modelling the constitution of parliament; a measure which he considered of such moment, and of so dangerous a tendency, that he once said to a friend now living, that he would sooner suffer his right hand to be cut off than vote for it."

† "Yet, such was the warmth of his friend's feelings, and with such constant pleasure did he reflect on the many happy days which they had spent together, that he not only in the first place obtained for him a permanent provision on the establishment of Ireland,[a] but, in addition to this proof of his regard and esteem, he never ceased, without any kind of solicitation, to watch over his interest with the most lively solicitude; constantly applying in person on his behalf to every new Lord Lieutenant, if he were acquainted with him; or if that were not the case, contriving by some circuitous means to procure Mr. Jephson's re-appointment to the office originally conferred on him by Lord Townshend: and by these means chiefly he was continued for a long series of years under twelve successive governors of Ireland in the same station, which had always before been considered a temporary office." — *Parl. Log.* 44.

[a] *Note by Editor Malone:* — "A pension of £300 a-year, which the Duke of Rutland during his government, from personal regard and a high admiration of Mr. Jephson's talents, increased to £600 *per annum* for the joint lives of himself and Mrs. Jephson. He survived our author but a few years, dying at his house at Black Rock, near Dublin, of a paralytic disorder, May 31, 1803, in his sixty-seventh year."

Note. — That not content with editing, and, in this way, recommending in the lump these principles of his friend and countryman, Malone takes up particular aphorisms, and applies his mind to the elucidation of them. This may be seen exemplified in Aphorisms 243, 249.

His Grace gave permanence to the sinecure, and doubled the salary of it. Here was liberality upon liberality — here was virtue upon virtue. It is by such things that merit is displayed — it is for such things that taxes are imposed; it is for affording matter and exercise for such virtues — it is for affording rewards for such merit, that the people of every country, in so far as any good use is made of them, are made.

To a man in whose eyes public virtue appeared in this only shape, no wonder that parliamentary reform should be odious: — of parliamentary reform, the effect of which, — and in eyes of a different complexion, one main use — would be, the drying up the source of all such virtues.

Here, in regard to the matter of fact, there are two representations given of the same subject—representations perfectly concurrent in all points with one another, though from very different quarters, and beginning as well as ending with very different views, and leading to opposite conclusions.

Parliament a sort of gaming-house; members on the two sides of each house the players; the property of the people—such portion of it as on any pretence may be found capable of being extracted from them — the stakes played for. Insincerity in all its shapes, disingenuousness, lying, hypocrisy, fallacy, the instruments employed by the players on both sides for obtaining advantages in the game: on each occasion — in respect of the side on which he ranks himself — what course will be most for the advantage of the universal interest, a question never looked at, never taken into account: on which side is the prospect of personal advantage in its several shapes — this the only question really taken into consideration: according to the answer given to this question in his own mind, a man takes the one or the other of the two sides—the side of those in office, if there be room or near prospect of room for him; the side of those by whom office is but in expectancy, if the future contingent presents a more encouraging prospect than the immediately present.

To all these distinguished persons — to the self-appointed professor and teacher of political profligacy, to his admiring editor, to their common and sympathizing friend,* the bigotry-ridden preacher of hollow and common-place morality—parliamentary reform we see in an equal degree, and that an extreme one, an object of abhorrence. How should it be otherwise? By parliamentary reform, the prey, the perpetually renascent prey, the fruit and object of the game, would have been snatched out of their hands. Official pay in no case more than what is sufficient for the security of adequate service — no sinecures, no pensions, for hiring flatterers and pampering parasites: — no plundering in any shape or for any purpose: — amidst the cries of No theory! No theory! the example of America a lesson, the practice of America transferred to Britain.

The notion of the general predominance of self-regarding over social interest has been held up as a weakness incident to the situation of those whose converse has been more with books than men. Be it so: look then to those teachers, those men of practical wisdom, whose converse has been with men at least as much as with books: look in particular to this right honourable, who in the House of Commons had doubled the twenty years' incubration necessary for law, who had served almost six apprenticeships, who in that office had served out five complete clerkships; — what says he? Self-regarding interest predominant over social interest?—self-regard predominant? No: but self-regard sole occupant: the universal interest, howsoever talked of, never so much as thought of — right and wrong, objects of avowed indifference.

Of the self-written Memoirs of Bubb Dodington, how much was said in their day!—of Gerard Hamilton's Parliamentary Logic, how little! The reason is not unobvious: Dodington was all anecdote — Hamilton was all theory. What Hamilton endeavoured to teach with Malone and Johnson for his bag-bearers, Dodington was seen to practise.

Nor is the veil of decorum cast off anywhere from his practice. In Hamilton's book for the first time has profligacy been seen stark naked. In the reign of Charles the Second, Sir Charles Sedley and others were indicted for exposing themselves in a balcony in a state of perfect nudity. In Gerard Hamilton may be seen the Sir Charles Sedley of political morality. Sedley might have stood in his balcony till he was frozen, and nobody the better, nobody much the worse: but Hamilton's self-exposure is most instructive.

Of parliamentary reform were a man to say that it is good because Gerard Hamilton was averse to it, he would fall into the use of one of those fallacies against the influence of which it is one of the objects of the ensuing work to raise a barrier:

This however may be said, and said without fallacy, viz. that it is the influence exercised by such men, and the use to which such their influence is put by them, that constitutes no small part of the political disease which has produced the demand for parliamentary reform in the character of a remedy.

To such men it is as natural and necessary that parliamentary reform should be odious, as that Botany Bay or the Hulks should be odious to thieves and robbers.

Above all other species of business, the one which Gerard Hamilton was most appre-

* See next page.

hensive of his pupils not being sufficiently constant in the practice of, is misrepresentation. Under the name of *action*, thrice was gesticulation spoken of as the first accomplishment of his profession by the Athenian orator:

By Gerard Hamilton, in a collection of aphorisms 553 in number,—in about 40, vice is recommended without disguise; twelve times is misrepresentation, *i. e.* premeditated falsehood with or without a mask, recommended in the several forms of which it presented itself to him as susceptible; viz. in the way of false addition three times, in the way of false substitution twice, and in the way of omission seven times.

He was fearful of deceiving the only persons he meant not to deceive (viz. the pupils to whom he was teaching the art of deceiving others,) had he fallen into any such omission as that of omitting in the teaching of this lesson any instruction or example that might contribute to render them perfect in it.

Of a good cause as such—of every cause that is entitled to the appellation of a good cause, it is the characteristic property that it does not stand in need—of a bad cause, of every cause that is justly designated by the appellation of a bad cause, it is the characteristic property that it does stand in need—of assistance of this kind. Not merely indifference as between good and bad, but predilection for what is bad, is therefore the cast of mind betrayed, or rather displayed, by Gerard Hamilton. For the praise of intelligence and active talent—that is, for so much of it as constitutes the difference between what is to be earned by the advocation of good causes only, and that which is to be earned by the advocation of bad causes likewise—of bad causes in preference to good ones,—for this species and degree of praise it is, that Gerard Hamilton was content to forego the merit of probity—of sincerity as a branch of probity, and take to himself the substance as well as the shape and colour of the opposite vice.

This is the work which, having been fairly written out by the author,* and thence by the editor presumed to have been intended for the press, had been "shown by him to his friend Dr. Johnson." This is the work which this same Dr. Johnson, if the editor is to be believed, "considered a very curious and masterly performance." This is the work in which that pompous preacher of melancholy moralities saw, if the editor is to be believed, nothing to "object to," but "the too great conciseness and refinement of some parts of it," and the occasion it gave to "a *wish* that some of the precepts had been more opened and expanded."

So far as concerns sincerity and candour in debate, the two friends indeed, even to judge of them from the evidence transmitted to us by their respective panegyrists, seem to have been worthy to smell at the same nosegay: and an "expansion and enlargement," composed by the hand that suggested it, would beyond doubt have been a "very curious and masterly," as well as amusing addition, to this "very curious and masterly performance."

Two months before his death, when, if he himself is to be believed, ambition had in such a degree been extinguished in him by age and infirmities, that after near forty years of experience a seat in parliament was become an object of indifference to him,†—four years after he had been visited by a fit of the palsy,‡—he was visited by a fit of virtue, and in the paroxysm of that fit hazarded an experiment, the object of which was to try whether, in a then approaching parliament, a seat might not be obtained without a complete sacrifice of independence. The experiment was not successful. From some Lord, whose name decorum has suppressed, he was, as his letter to his Lordship testified, "on the point of receiving" a seat; and the object of this letter was to learn whether, along with the seat, "the power of thinking for himself" might be included in the grant;—the question being accompanied with a request, that, in case of the negative, some other nominee

* Extract from the preface to Hamilton's work:—

"But in the treatise on Parliamentary Logic we have the fruit and result of the experience of one, who was by no means unconversant with law, and had himself sat in Parliament for more than forty years; who in the commencement of his political career burst forth like a meteor, and for a while obscured his contemporaries by the splendour of his eloquence; who was a most curious observer of the characteristic merits and defects of the distinguished speakers of his time; and who, though after his first effort he seldom engaged in public debate, devoted almost all his leisure and thoughts, during the long period above mentioned, to the examination and discussion of all the principal questions agitated in parliament, and of the several topics and modes of reasoning by which they were either supported or opposed.

"Hence the rules and precepts here accumulated, which are equally adapted to the use of the pleader and orator: nothing vague, or loose, or general,[a] is delivered; and the most minute particularities and artful turns of debate are noticed with admirable acuteness, subtilty, and precision. The work, therefore, is filled with practical axioms, and parliamentary and forensic wisdom, and cannot but be of perpetual use to all those persons who may have occasion to use their discursive talents within or without the doors of the House of Commons, in conversation at the bar, or in parliament.

"This tract was fairly written out by the author, and therefore may be presumed to have been intended by him for the press. He had shown it to his friend Dr. Johnson, who considered it a very curious and masterly performance."

† Page 26. ‡ Page 14.

[a] For "*nothing*," read "*the greatest part.*"—J. B.

might be the object of his Lordship's "confidence."

The request was inadmissible, and the confidence found some other object.

It is in the hope of substituting men to puppets, and the will of the people to the will of noble lords, puppets themselves to ministers or secret advisers, that parliamentary reform has of late become once more an object of general desire: but parliamentary reform was that sort of thing which "he would sooner," he said, "suffer his hand to be cut off, than vote for:"* whether it was before or after the experiment that this magnanimity was displayed, the editor has not informed us.

The present which the world received in the publication of this work may on several accounts be justly termed a valuable one. The only cause of regret is, that the editor should, by the unqualified approbation and admiration bestowed upon it, have made the principles of the work as it were his own.

True it is, that where instruction is given showing how mischief may be done or aimed at, — whether it shall serve as a precept or a prohibition, depends in the upshot, upon the person on whom it operates with effect:

Many a dehortation, that not only has the effect of an exhortation, but was designed to have that effect;

Instructions how to administer poisons with success, may on the other hand have the effect of enabling a person who takes them up with an opposite view, to secure himself the more effectually against the attack of poisons;

But by the manner in which he writes, by the accessory ideas presented by the words in which the instruction is conveyed, there can seldom be much difficulty in comprehending in the delivery of his instructions whether the writer wishes that the suggestions conveyed by them should be embraced or rejected:

If occasionally there can be room for doubt in this respect, at any rate no room can there be for any in the case of Gerard Hamilton. As little can there be in the case of his editor and panegyrist: "*Qui mihi discipulus puer es, cupis atque doceri, huc ades, hæc animo concipe dicta tuo:*" The object or end in view is, on occasion of a debate in parliament — in a supreme legislative assembly — how to gain your point, whatever it be. The means indicated as conducive to that end are sometimes fair ones, sometimes foul ones; and be they fair or foul, they are throughout delivered with the same tone of seriousness and composure.

Come unto me all ye who have a point to gain, and I will show you how: bad or good, so as it be not parliamentary reform, to me it is matter of indifference.

Here, then, whatever be the influence of authority — authority in general, and that of the writer in particular — it is in the propagation of insincerity (of insincerity to be employed in the service it is most fit for, and in which it finds its richest reward) that throughout the whole course of this work, and under the name of Gerard Hamilton, not to speak of his editor and panegyrist, such authority exerts itself.

To secure their children from falling into the vice of drunkenness, it was the policy, we are told, of Spartan fathers, to exhibit their slaves in a state of inebriation, that the contempt might be felt to which a man stands exposed when the intellectual part of his frame has been thrown into the disordered state to which it is apt by this means to be reduced. An English father, if he has any regard for the morals of his son, and in particular for that vital part in which sincerity is concerned, will perhaps nowhere else find so instructive an example as Gerard Hamilton has rendered himself by this book: in that mirror may be seen to what a state of corruption the moral part of man's frame is capable of being reduced — to what a state of degradation, in the present state of parliamentary morality, a man is capable of sinking even when sober, and without any help from wine; and with what deliberate zeal he may himself exert his powers in the endeavour to propagate the infection in other minds.

* Page xxxvii.

PART I. FALLACIES OF AUTHORITY,

THE SUBJECT OF WHICH IS AUTHORITY IN VARIOUS SHAPES, AND THE OBJECT TO REPRESS ALL EXERCISE OF THE REASONING FACULTY.

WITH reference to any measures having for their object *the greatest happiness of the greatest number*, the course pursued by the adversaries of such measures has commonly been, in the first instance, to endeavour to repress altogether the exercise of the reasoning faculty, by adducing authority in various shapes as conclusive upon the subject of the measure proposed.

But before any clear view can be given of

the deception liable to be produced by the abuse of the species of argument here in question, it will be necessary to bring to view the distinction between the proper and the improper use of it.

In the ensuing analysis of Authority, one distinction ought to be borne in mind; — it is the distinction between what may be termed a question of *opinion*, or *quid faciendum*; and what may be termed a question of *fact*, or *quid factum*. Since it will frequently happen, that whilst the authority of a person in respect to a question of fact is entitled to more or less regard, it is not so entitled in respect of a question of opinion.

CHAPTER I.

§ 1. *Analysis of Authority.*

§ 2. *Appeal to Authority, in what cases fallacious.*

I. WHAT, on any given occasion, is the legitimate weight or influence of authority, regard being had to the different circumstances in which a person, the supposed declaration of whose opinion constitutes the authority in question, was placed at the time of the delivery of such declaration?

1*st*, Upon the degree of relative and adequate *intelligence* on the part of the person whose opinion or supposed opinion constitutes the authority in question, — say of the *persona cujus*; — 2*dly*, Upon the degree of relative *probity* on the part of that same person; — 3*dly*, Upon the nearness or remoteness of the relation between the immediate subject of such his opinion and the question in hand; — 4*thly*, Upon the fidelity of the medium through which such supposed opinion has been transmitted (including correctness and completeness:) upon such circumstances, the legitimately persuasive force of the authority thus constituted seems to depend: such are the sources in which any deficiency in respect of such persuasive force is to be looked for.

Deficiency of attention — *i. e.* intensity and steadiness of attention — with reference to the influencing circumstances on which the opinion, in order to be correct, required to be grounded; deficiency in respect of opportunity or matter of information, with reference to the individual question in hand; distance in point of time from the scene of the proposed measure; distance in point of place: — such, again, are the sources in which, the situation of the person in question being given, any deficiency in respect of relative and adequate intelligence is, it seems, to be looked for.

It is in the character of a cause of deficiency in relative and adequate information, that distance in point of time operates as a cause of deficiency in respect of relative and adequate intelligence; and so in regard to distance in point of place.

As to relative probity, any deficiency referable to this head will be occasioned by the exposure of the *persona cujus* to the action of sinister interest: concerning which, see Part V. Chapter III. — *Causes of the utterance of these fallacies.*

The most ordinary and conspicuous deficiency in the article of relative probity, is that of sincerity: the improbity consisting in the opposition or discrepancy between the opinion expressed and the opinion really entertained.

But as not only declaration of opinion, but opinion itself, is exposed to the action of sinister interest, — in so far as this is the case, the deficiency is occasioned in two ways: by the action of the sinister interest, either the relevant means and materials are kept out of the mind; or, if this be not found practicable, the attention is kept from fixing upon them with the degree of intensity proportioned to their legitimately persuasive force.

As to the mass of information received by any person in relation to a given subject, the correctness and completeness of such information, and thence the probability of correctness on the part of the opinion grounded on it, will be in the joint ratio of the sufficiency of the *means* of collecting such information, and the strength of the *motives* by which he was urged to the employment of those means.

On both these accounts taken together, at the top of the scale of trustworthiness stands that mass of authority which is constituted by what may be termed *scientific* or professional *opinion*: that is, opinion entertained in relation to the subject in question by a person who, by special means and motives attached to a particular situation in life, may with reason be considered as possessed of such *means* of insuring the correctness of his opinion, as cannot reasonably be expected to have place on the part of a person not so circumstanced.

As to the special *motives* in question, they will in every case be found to consist of good or evil; profit, for instance, or loss, presenting themselves as eventually likely to befall the person in question — profit or other good in case of the correctness of his opinion — loss or other evil in the event of its incorrectness.

In proportion to the force with which a man's will is operated upon by the motives in question, is the degree of attention employed in looking out for the means of information, and the use made of them in the way of reflection towards the formation of his opinion.

Thus in the case of every occupation which a man engages in with a view to profit, the hope of gaining his livelihood, and the fear of not gaining it, are the motives by which

he is urged to apply his attention to the collection of whatsoever information may contribute to the correctness of the several opinions which he may have occasion to form respecting the most advantageous method of carrying on the several operations by which such profit may be obtained.

1. The legitimately persuasive force of professional authority being taken as the highest term in the scale, the following may be noticed as expressive of so many other species of authority, occupying so many inferior degrees in the same scale: —

2. Authority derived from *power*. The greater the quantity of power a man has, no matter in what shape, the nearer the authority of his opinion comes to professional authority, in respect of the facility of obtaining the means conducive to correctness of decision.

3. Authority derived from *opulence*. Opulence — being an instrument of power, and to a considerable extent applicable in a direct way to many or most of the purposes to which power is applicable — seems to stand next after power in the scale of instruments of facility as above.

4. Authority derived from *reputation*, considered as among the efficient causes of respect. By reputation, understand, on this occasion, general reputation, not special and relative reputation, which would rank the species of authority under the head of professional authority as above.

Note, that of all these four species of authority, it is only in the case of the first that the presumable advantage which is the efficient cause of its legitimately persuasive force extends to the article of motives as well as means. By having the *motives* that tend to correctness of information, the professional man has the *means* likewise; since it is to the force of the motives under the stimulus of which he acts, that he is indebted for whatever means he acquires. It is from his having the motives, that it follows that he has the means.

But in those other cases, whatsoever be the *means* which a man's situation places within his reach, it follows not that he has the *motives* — that he is actually under the impulse of any motive sufficient to the full action of that desire and that energy by which alone he can be in an adequate degree put in possession of the means.

On the contrary, in proportion as in the scale of power the man in question rises above the ordinary level, in that same proportion, in respect of motives for exertion (be the line of action what it may,) he is apt to sink below the same level: because, the greater the quantum of the share of the general mass of objects of desire that a man is already in possession of, the greater is the amount of that portion of his desires which is already in a state of saturation, and consequently the less the amount of that portion which, remaining unsatiated, is left free to operate upon his mind in the character of a motive.

Under oriental despotism, the person at whose command the *means* of information exist in a larger proportion than they do in the instance of any other person whatever, is the *despot;* but necessary *motives* being wanting, no use is made by him of these means, and the general result is a state of almost infantine imbecility and ignorance.

Such, in kind, varying only in degree, is the case with every hand in which power is lodged, unincumbered with obligation; or, in other words, with sense of eventual danger.

In England, the king, the peer, the opulent borough-holding or county-holding country gentleman, should, on the above principle, present an instance of the sort of double scale in question, in which, while means decrease, motives rise.

But so long as he takes any part at all in public affairs, the sense of that weak kind of eventual responsibility to which, notwithstanding the prevailing habits of idolatry, the monarch, as such, stands at all times exposed, suffices to keep his intellectual faculties at a point more or less above the point of utter ignorance; whereas, short of proveable idiotism, there is no degree of imbecility that in either of those two other situations can suffice to render it matter of danger or inconvenience to the possessor, either to leave altogether unexercised the power annexed to such situation, or, without the smallest regard for the public welfare, to exercise it in whatever manner may be most agreeable or convenient to himself.

All this while, it is only on the supposition of perfect relative probity, viz. of that branch of probity that consists of sincerity, as well as absence of all such sources of delusion as to the person in question are liable to produce the effects of insincerity — in a word, it is only on the supposition of the absence of exposure to the action of any sinister interest, operating in such direction as to tend to produce either erroneous opinion, or misrepresentation of a man's opinion on the subject in question, that, in so far as it depends on the information necessary to correctness of opinion, the title of a man's authority to regard bears any proportion either to motives or to means of information as above.

On the contrary, if, either immediately or through the medium of the will, a man's understanding be exposed to the dominion of sinister interest, the more complete as well as correct the mass of relative information is which he possesses, the more completely destitute of all title to regard, *i. e.* to confidence, unless it be in the opposite direction,

will the authority, or pretended or real opinion, be.

Hence it is, that on the question, What is the system of remuneration best adapted to the purpose of obtaining the highest degree of official aptitude throughout the whole field of official service? — the authority of any person, who here or elsewhere, now or formerly, was in possession or expectation of any such situation as that of minister of state, so far from being greater than that of an average man, is not equal to 0, but in the mathematical sense negative, or so much below 0; *i. e.* so far as it affords a reason for looking upon the opposite opinion as the right and true one.

So, again, as to this question — What, in so far as concerns cognoscibility, or economy and exped tion in procedure, the state of the law *ought* to be? — in the instance of any person who here or elsewhere, recently or formerly, but more particularly in this country, was in possession or expectation of any situation, professional or official, the profitableness of which, in the shape of pecuniary emolument, or in any other shape (such as power, reputation, ease, and occasionally vengeance,) depended upon the incognoscibility, the expensiveness, the dilatoriness, the vexatiousness of the system of judicial procedure — the weight of the authority — the strength of its title to credit on the part of those understandings to which the force of it is applied, — is not merely equal to 0, but in the mathematical sense negative, or so much below 0.

Note, that where, as above, the weight or probative force of the authority in question is spoken of as being not positive but negative (being rendered so by sinister interest,) what is taken for granted is, that the direction in which the authority is offered is the same as that in which the sinister interest acts; for if, the direction in which the sinister interest acts lying one way, the direction in which the opinion acts lies the other way — in such case, the title of the opinion to credit on the part of the understandings to which it is proposed, so far from being destroyed or weakened, is much increased; because the grounds for correctness of opinion, the motives and the means which in that case lead to correctness being more completely within the reach of, and according to probability present to, the minds of this class of men, the forces that tend to promote aberration having by this supposition spent themselves in vain, the chance for correctness is thereby greater.

Accordant with this, and surely enough accordant with experience and common sense, is one of the few rational rules that as yet have received admittance among the technically-established rules of evidence. In a man's own favour his own testimony is the weakest — in his disfavour, the strongest, evidence.

It is on this account that, wherever a man is in a superior degree furnished as above with means of, and motives for, obtaining relevant information, the stronger the force of the sinister interest under the action of which his opinion is delivered, the stronger is his title to attention. In the way of direct and relevant argument applying to the question in hand in a direct and specific way, if the question be susceptible of any such arguments, in proportion to the efficiency of the motives and means he has for the acquisition of such relevant information, is the probability of his bringing such information to view. If, then, instead of bringing to view any such relevant information, or by way of supplement and support to such relevant information (when weak and insufficient,) the arguments which he brings to view are of the irrelevant sort, the addition of such bad arguments affords a sort of circumstantial evidence, and that of no mean degree of probative force, of the inability of the side thus advocated to furnish any good ones.

Closeness of the relation between the immediate subject in hand, and the subject of the supposed opinion of which the authority is composed, has been mentioned as the third circumstance necessary to be considered in estimating the credit due to authority: — of this, it is evident enough, there cannot be any common and generally applicable measure: it is that sort of quantity, of the amount of which a judgment can only be pronounced in each individual case.

As to the fidelity of the *medium* through which the opinion constitutive of the authority in question has been, or is supposed to have been, transmitted, — it is only *pro memoria* that this topic is here brought to view in the list of the circumstances from which the legitimately persuasive force of an opinion constitutive of authority is liable to experience decrease. of its admission into this list the propriety is, on the bare mention, as manifest as it is in the power of reasoning to make it. In this respect, the rule and measure, as well as cause, of such decrease, stand exactly on the same ground as the rule with respect to any other evidence; authority being, to the purpose in question, neither more nor less than an article of circumstantial evidence.

The need for the legitimately persuasive force of authority, *i. e.* probability of comparatively superior information on the one hand, is in the inverse ratio of information on the part of the person on whom it is designed to operate, on the other. The less the degree in which each man is qualified to form a judgment on any subject on the ground of specific and relevant information — on the

ground of direct evidence — the more cogent the necessity he is under of trusting, with a degree of confidence more or less implicit, to that species of circumstantial evidence: and in proportion to the number of the persons who possess, each within himself, the means of forming an opinion on any given subject on the ground of such direct evidence, the greater the number of the persons to whom it ought to be matter of shame to frame and pronounce their respective decision, on no better ground than that of such inconclusive and necessarily fallacious evidence.

Of the truth of this observation, men belonging to the several classes, whose situation in the community has given to them, in conjunction with efficient power, a separate and sinister interest opposite to that of the community in general, have seldom failed to be in a sufficient degree percipient.

In this perception, in the instance of the fraternity of lawyers, may be seen one cause, though not the only one, of the anxiety betrayed, and pains taken, to keep the rule of action in a state of as complete incognoscibility as possible on the part of those whose conduct is professed to be directed by it, and whose fate is in fact disposed of by it.

In this same perception, in the instance of the clergy of old times in the Romish church, may be seen in like manner the cause, or at least one cause, of the pains taken to keep in the same state of incognoscibility the acknowledged rule of action in matters of sacred and supernatural law.

In this same perception, in the instance of the English clergy of times posterior to those of the Romish church — in this same perception may be seen one cause of the exertions made by so large a proportion of the governing classes of that hierarchy, to keep back, and if possible render abortive the system of invention which has for its object the giving to the exercise of the art of reading the highest degree of universality possible.

To return. Be the subject-matter what it may, to the account of fallacies cannot be placed any mention made of an opinion to such or such an effect, as having been delivered or intimated by such or such a person by name, when the sole object of the reference is to point out a place where relevant arguments adduced on a given occasion may be found in a more complete or perspicuous state than they are on the occasion on which they are adduced.

In the case thus supposed, there is no *irrelevancy*. The arguments referred to are by the supposition relevant ones; such as, if the person by whom they have been presented to view were altogether unknown, would not lose anything of their weight; the opinion is not presented as constitutive of authority, as carrying any weight of itself, and independently of the considerations which he has brought to view.

Neither is there any fallacy in making reference to the opinion of this or that professional person, in a case to such a degree professional or scientific, with relation to the hearers or readers, that the forming a correct judgment on such relevant and specific arguments as belong to it, is beyond their competence. In matters touching medical science, chemistry, astronomy, the mechanical arts, the various branches of the art of war, &c., no other course could be pursued.

§ 2. *Appeal to Authority, in what cases fallacious.*

The case in which reference to authority is open to the imputation of fallacy, is where, in the course of a debate touching a subject lying in such sort within the comprehension of the debaters, that argument bearing the closest relation to it would be perfectly within the sphere of their comprehension, — *authority* (a sort of argument in the case here in question not relevant) is employed in the place of such relevant arguments as might have been adduced on one side, or in opposition to irrelevant ones adduced on the other side.

But the case in which the practice of adducing authority in the character of an argument is in the highest degree exposed to the imputation of fallacy, is, where the situation of the debaters being such, that the forming a correct conception of, and judgment on, such relevant arguments as the subject admits, is not beyond their competency, the *opinion*, real or supposed, of any person who from his profession or other particular situation, derives an interest opposite to that of the public, is adduced in the character of an argument, in lieu of such relevant arguments as the question ought to furnish. — (In an Appendix to this Chapter will be given examples of persons whose declared opinions, on a question of legislation, are in a peculiar degree liable to be tinged with falsity by the action of sinister interest.)

He who, on a question concerning the propriety of any law or established practice with reference to the time being, refers to authority as decisive of the question, assumes the truth of one or other of two positions: viz. that the principle of utility — *i. e.* that the greatest happiness of the greatest number —

* "An unquestionable maxim," it is said, is this: — "Reason, and not authority, should determine the judgment:" Said? and by whom? even by a bishop; and by what bishop? even Bishop Warburton: and this is not in one work only, but in two. The above words are from his Div. Legat. ii. 302; and in his Alliance, &c. is a passage to the same effect: here, then, we have authority against authority.

is not at the time in question the proper standard for judging of the merits of the question; or, that the practice of other and former times, or the opinion of other persons, ought to be regarded in all cases as conclusive evidence of the nature and tendency of the practice — conclusive evidence, superseding the necessity and propriety of any recourse to reason or present experience.

In the first case, being really an enemy to the community, that he should be esteemed as such by all to whom the happiness of the community is an object of regard, is no more than right and reasonable, — no more than what, if men acted consistently, would uniformly take place.

In the other case, what he does is, virtually to acknowledge himself not to possess any powers of reasoning which he himself can venture to think it safe to trust to: incapable of forming for himself any judgment by which he looks upon it as safe to be determined, he betakes himself for safety to some other man, or set of men, of whom he knows little or nothing, except that they lived so many years ago; that the period of their existence was by so much anterior to his own time — by so much anterior, and consequently possessing for its guidance so much the less experience.

But when a man gives this account of himself — when he represents his own mind as labouring under this kind and degree of imbecility, — what can be more reasonable than that he should be taken at his word? — that he should be considered as a person labouring under a general and incurable imbecility, from whom nothing relevant can reasonably be expected?

He who, in place of reasoning deduced (if the subject be of a practical nature) from the consideration of the end in view, employs authority, makes no secret of the opinion he entertains of his hearers or his readers: he assumes that those to whom he addresses himself are incapable, each of them, of forming a judgment of their own. If they submit to this insult, may it not be presumed that they acknowledge the justice of it?

Of imbecility — at any rate of self-conscious and self-avowed imbecility — proportionable humility ought naturally to be the result;

On the contrary, so far from humility, — of this species of idolatry — of this worshipping of dead men's bones, — all the passions the most opposite to humility — pride, anger, obstinacy, and overbearingness, — are the frequent, not to say the constant, accompaniments.

With the utmost strength of mind that can be displayed in the field of reasoning, no reasonable man ever manifests so much heat, assumes so much, or exhibits himself disposed to bear so little, as these men, whose title to regard and notice is thus given up by themselves.

Whence this inconsistency? — whence this violence? From this alone, that having some abuse to defend — some abuse in which they have an interest and a profit — and finding it on the ground of present public interest indefensible, they fly for refuge to the only sort of argument in which so much as the pretension of being sincere in error can find countenance.

By authority, support, the strength of which is proportioned to the number of the persons joining in it, is given to systems of opinions at once absurd and pernicious — to the religion of Buddh, of Brama, of Foh, of Mahomet.

And hence it may be inferred that the probative force of authority is not increased by the number of those who may have professed a given opinion — unless, indeed, it could be proved that each individual of the multitudes who professed the opinion, possessed in the highest degree the means and motives for ensuring its correctness. Even in such a case, it would not warrant the substitution of the authority for such direct evidence and arguments as any case in debate might be able to supply, supposing the debaters capable of comprehending such direct evidence and arguments: but that, in ordinary cases, no such circumstantial evidence should possess any such legitimately probative force as to warrant the addition, much less the substitution of it, to that sort of information which belongs to direct evidence, will, it is supposed, be rendered sufficiently apparent by the following considerations: —

1. If in theory any the minutest degree of force were ascribed to the elementary monade of the body of authority thus composed, and this theory were followed up in practice, the consequence would be, the utter subversion of the existing state of things: — as for example — if distance in point of time were not sufficient to destroy the probative force of such authority, the Catholic religion would in England be to be restored to the exclusive dominion it possessed and exercised for so many centuries: the toleration laws would be to be repealed, and persecution to the length of extirpation would be to be substituted to whatever liberty in conduct and discourse is enjoyed at present; — and in this way, after the abolished religion had thus been triumphantly restored, an inexorable door would be shut against every imaginable change in it, and thence against every imaginable reform or improvement in it, through all future ages:

2. If distance in point of place were not understood to have the same effect, some other religion than the Christian — the religion or Mahomet for example, or the way of thinking

in matters of religion prevalent in China — would have to be substituted by law to the Christian religion

In authority, defence, such as it is, has been found for every imperfection, for every abuse, for every the most pernicious and most execrable abomination that the most corrupt system of government has ever husbanded in its bosom: —

And here may be seen the mischief necessarily attached to the course of him whose footsteps are regulated by the finger of this blind guide.

What is more, from hence may inferences be deduced — nor those ill-grounded ones — respecting the probity or improbity, the sincerity or insincerity, of him who, standing in a public situation, blushes not to look to this blind guide, to the exclusion of, or in preference to, reason — the only guide that does not begin with shutting his own eyes, for the purpose of closing the eyes of his followers.

As the world grows older, if at the same time it grows wiser (which it will do unless the period shall have arrived at which experience, the mother of wisdom, shall have become barren,) the influence of authority will in each situation, and particularly in parliament, become less and less.

Take any part of the field of moral science, private morality, constitutional law, private law — go back a few centuries, and you will find argument consisting of reference to authority, not exclusively, but in as large a proportion as possible. As experience has increased, authority has been gradually set aside, and reasoning, drawn from facts, and guided by reference to the end in view, true or false, has taken its place.

Of the enormous mass of Roman law heaped up in the school of Justinian — a mass, the perusal of which would employ several lives occupied by nothing else — materials of this description constitute by far the greater part. A throws out at random some loose thought: B, catching it up, tells you what A thinks — at least, what A said: C tells you what has been said by A and B; and thus, like an avalanche, the mass rolls on.

Happily, it is only in matters of law and religion that endeavours are made, by the favour shown and currency given to this fallacy, to limit and debilitate the exercise of the right of private inquiry in as great a degree as possible, though at this time of day the exercise of this essential right can no longer be suppressed in a complete and direct way by legal punishment.

In mechanics, in astronomy, in mathematics, in the new-born science of chemistry — no one has at this time of day either effrontery or folly enough to avow, or so much as to insinuate, that the most desirable state of these branches of useful knowledge, the most rational and eligible course, is to substitute decision on the ground of authority, to decision on the ground of direct and specific evidence.

In every branch of physical art and science, the folly of this substitution or preference is matter of demonstration — is matter of intuition, and as such is universally acknowledged. In the moral branch of science, religion not excluded, the folly of the like receipt for correctness of opinion would not be less universally recognised, if the wealth, the ease, and the dignity attached to and supported by the maintenance of the opposite opinion, did not so steadily resist such recognition.

Causes of the employment and prevalence of this fallacy.

It is obvious that this fallacy, in all its branches, is so frequently resorted to by those who are interested in the support of abuses, or of institutions pernicious to the great body of the people, with the intention of suppressing all exercise of reason. A foolish or untenable proposition, resting on its own support or the mere credit of the utterer, could not fail speedily to encounter detection and exposure; — the same proposition, extracted from a page of Blackstone, or from the page or mouth of any other person to whom the idle and unthinking are in the habit of unconditionally surrendering their understandings, shall disarm all opposition.

Blind obsequiousness, ignorance, idleness, irresponsibility, anti-constitutional dependence, anti-constitutional independence, are the causes which enable this fallacy to maintain such an ascendency in the governing assemblies of the British empire.

First, In this situation one man is on each occasion ready to borrow an opinion of another, because through ignorance and imbecility he feels himself unable, or through want of solicitude unwilling, to form one for himself; and he is thus ignorant, if natural talent does not fail him, because he is so *idle*. Knowledge, especially in so wide and extensive a field, requires study; study, labour of mind, bestowed with more or less energy, for a greater or less length of time.

But, secondly, In a situation for which the strongest talents would not be more than adequate, there is frequently a failure of natural talent; because in so many instances admission to that situation depends either on the person admitted, or on others to whom, whether he has or has not the requisite talents is a matter of indifference, that no degree of intellectual deficiency, short of palpable idiocy, can have the effect of excluding a man from occupying it.

Thirdly, The sense of responsibility is in the instance of a large proportion of the members wanting altogether; because in so small

a proportion are they at any time in any degree of dependence on the people whose fate is in their hands, and because, in the instance of the few who are in any degree so dependent, the efficient cause, and consequently the feeling of such dependence, endures during so small a proportion of the time for which they enjoy their situations: because also, while so few are dependent on those on whom they ought to be dependent, so many are dependent on those who ought to be dependent on them — those servants of the crown, on whose conduct they are commissioned by their constituents to act as judges. What share of knowledge, intelligence, and natural talent, is in the House, is thus divided between those who are, and their rivals who hope to be, servants of the crown. The consequence is, that, those excepted in whom knowledge, intelligence, and talent, are worse than useless, the House is composed of men, the furniture of whose minds is made up of discordant prejudices, of which on each occasion they follow that by which the interest or passion of the moment is most promoted.

Then, with regard to responsibility, so happily have matters been managed by the house, — a seat there is not less clear of obligation than a seat in the opera-house: in both, a man takes his seat, then only when he cannot find more amusement elsewhere; for both the qualifications are the same, — a ticket begged or bought: in neither is a man charged with any obligation, other than the negative one of not being a nuisance to the company; in both, the length as well as number of attendances depends on the amusement a man finds, except, in the case of the house, as regards the members dependent on the crown. True it is, that a self-called independent member is not necessarily ignorant and weak: if by accident a man possessed of knowledge and intelligence is placed in the house, his seat will not deprive him of his acquirements. All, therefore, that is meant is, only that ignorance does not disqualify, not that knowledge does. Of the crown and its creatures it is the interest that this ignorance be as thick as possible. Why? Because, the thicker the ignorance, the more completely is the furniture of men's minds made up of those interest-begotten prejudices, which render them blindly obsequious to all those who, with power in their hands, stand up to take the lead.

But the Emperor of Morocco is not more irresponsible, and therefore more likely to be ignorant and prone to be deceived by the fallacy of authority, than a member of the British Parliament: — the Emperor of Morocco's power is clear of obligation; so is the member's: — the emperor's power, it is true is an integer, and the member's but a fraction of it; but no ignorance prevents a man from becoming or continuing Emperor of Morocco, nor from becoming or continuing a member: — the emperor's title is derived from birth; so is that of many a member: — to enjoy his despotism, no fraud, insincerity, hypocrisy, or jargon, is necessary to the emperor; much of all to the member: — by ascending and maintaining his throne, no principle is violated by the emperor; by the member, if a borough-holder, many are violated on his taking and retaining his seat: — by being a despot, the emperor is not an impostor; the member is: — the emperor pretends not to be a trustee, agent, deputy, delegate, representative; lying is not among the accompaniments of his tyranny and insolence; the member does pretend all this, and (if a borough-holder) lies. A trust-holder? Yes; but a trust-breaker; — an agent? Yes; but for himself; — a representative of the people? Yes; but so as Mr. Kemble is of Macbeth; — a deputy? Yes; because it has not been in their power to depute, to delegate anybody else: — deputy, — delegate, — neither title he assumes but for argument, and when he cannot help it; deputation being matter of fact, the word presents an act with all its circumstances — viz. fewness of the electors, their want of freedom, &c.; representation is a more convenient word — the acts, &c. are kept out of sight by it — it is a mere fiction, the offspring of lawyer-craft, and any one person or thing may be represented by any other: by canvass with colours, a man is represented; by a king, the whole people; by an ambassador, the king, and thus the people.

Remedy against the influence of this fallacy.

For banishing ignorance, for substituting to it a constantly competent measure of useful, appropriate, and general instruction, the proper, the necessary, the only means, lie not deep beneath the surface.

The sources of instruction being supposed at command, and the quantity of natural talent given, the quantity of information obtained will in every case be as the quantity of mental labour employed in the collection of it — the quantity of mental labour, as the aggregate strength of the motives by which a man is excited to labour.

In the existing order of things, there is, comparatively speaking, no instruction obtained, because no labour is bestowed: no labour is bestowed, because none of the motives by which men are excited to labour are applied in this direction.

The situation being by the supposition an object of desire, if the case were such, that without labour employed in obtaining instruction, there would be no chance of obtaining the situation, or but an inferior chance; —

while, in case of labour so employed, there would be a certainty, or a superior chance: — here, instruction would have its motives; — here, labour applied to the attainment of instruction — here, consequently, instruction itself — would have its probably efficient cause.

The quality — *i. e.* the relative applicability of the mass of information obtained — is an object not to be overlooked.

The goodness of the quality will depend on the liberty enjoyed in respect of the choice. By prohibitions, with penalties attached to the delivery of alleged information relative to a subject in question, or any part of it, the quality of the whole mass is impaired, and an implied certificate is given of the truth and utility of whatsoever portion is thus endeavoured to be suppressed.

APPENDIX.

Examples of descriptions of persons whose declared opinions upon a question of legislation are peculiarly liable to be tinged with falsity by the action of sinister interest.

1. Lawyers; oppositeness of their interest to the universal interest.

THE opinions of lawyers in a question of legislation, particularly of such lawyers as are or have been practising advocates, are peculiarly liable to be tinged with falsity by the operation of sinister interest. To the interest of the community at large, that of every advocate is in a state of such direct and constant opposition (especially in civil matters,) that the above assertion requires an apology to redeem it from the appearance of trifling: the apology consists in the extensively prevailing propensity to overlook and turn aside from a fact so entitled to notice. It is the people's interest, that delay, vexation, and expense of procedure, should be as small as possible: — it is the advocate's, that they should be as great as possible; viz. expense, in so far as his profit is proportioned to it — factitious vexation and delay, in so far as inseparable from the profit-yielding part of the expense. As to uncertainty in the law, it is the people's interest that each man's security against wrong should be as complete as possible; that all his rights should be known to him; that all acts, which in the case of his doing them will be treated as offences, may be known to him as such, together with their eventual punishment, that he may avoid committing them, and that others may, in as few instances as possible, suffer either from the wrong, or from the expensive and vexatious remedy. Hence it is their interest, that as to all these matters the rule of action, in so far as it applies to each man, should at all times be not only discoverable, but actually present to his mind. Such knowledge, which it is every man's interest to possess to the greatest, it is the lawyer's interest that he possess it to the narrowest, extent, possible. It is every man's interest to keep out of lawyers' hands as much as possible — it is the lawyer's interest to get him in as often, and keep him in as long, as possible, — and thence, that any written expression of the words necessary to keep non-lawyers out of his hand may as long as possible be prevented from coming into existence; and when in existence, may as long as possible be kept from being present to his mind, — and when presented, from staying there.* It is the lawyer's interest, therefore, that people should continually suffer for the non-observance of laws, which, so far from having received efficient promulgation, have never yet found any authoritative expression in words. This is the perfection of oppression: yet, propose that access to knowledge of the laws be afforded by means of a code, lawyers, one and all, will join in declaring it impossible. To any effect, as occasion occurs, a judge will forge a rule of law: to that same effect, in any determinate form of words, propose to make a law, that same judge will declare it impossible. It is the judge's interest that on every occasion his declared opinion be taken for the standard of right and wrong — that whatever he declares right or wrong be universally received as such, how contrary soever such declaration be to truth and utility, or to his own declaration at other times: — hence, that within the whole field of law, men's opinions of right and wrong should be as contradictory, unsettled, and thence as obsequious to him as possible; in particular, that the same conduct which to others would occasion shame and punishment, should, to him and his, occasion honour and reward; that on condition of telling a lie, it should be in his power to do what he pleases, the injustice and falsehood being regarded with complacency and reverence; that as often as by falsehood, money, or advantage in any other shape can be produced to him, it should be regarded as proper for him to employ reward or punishment, or both, for the procurement of such falsehood. Consistently with men's abstaining from violences, by which the person and property of him and his would be alarmingly endangered, it is his interest that intellectual as well as moral depravation should be as intense and extensive as possible; that transgressions cognizable by him

* A considerable proportion of what is termed the common law of England is in this oral and unwritten state. The cases in which it has been clothed with words — that is, in which it has been framed and pronounced — are to be found in the various collections of reported decisions. These decisions, not having the sanction of a law passed by the legislature, are confirmed or overruled at pleasure by the existing judges; so that, except in matters of the most common and daily occurrence, they afford no rule of action at all.

should be as numerous as possible; that injuries and other transgressions committed by him should be reverenced as acts of virtue; that the suffering produced by such injuries should be placed, not to his account, but to the immutable nature of things, or to the wrongdoer, who, but for the encouragement from him, would not have become such. His professional and personal interest being thus adverse to that of the public, from a lawyer's declaration that the tendency of a proposed law relative to procedure, &c. is pernicious, the contrary inference may not unreasonably be drawn. From those habits of misrepresenting their own opinion (*i. e.* of insincerity) which are almost peculiar to this in comparison with other classes, one presumption is, that he does not entertain the opinion thus declared; — another, that if he does, he has been deceived into it by sinister interest, and the authority of co-professional men, in like manner deceivers or deceived: in other words, it is the result of interest-begotten prejudice. In the case of every other body of men, it is generally expected that their conduct and language will be for the most part directed by their own interest, that is, by their own view of it. In the case of the lawyer, the ground of this persuasion, so far from being weaker, is stronger than in any other case. His evidence being thus *interested evidence*, according to his own rules his declaration of opinion on the subject here pointed out would not be so much as hearable. It is true, were those rules consistently observed, judicature would be useless, and society dissolved: accordingly they are not so observed, but observed or broken pretty much at pleasure; but they are not the less among the number of those rules, the excellence and inviolability of which the lawyer is never tired of trumpeting. But on any point such as those in question, nothing could be more unreasonable, nothing more inconsistent with what has been said above, than to refuse him a *hearing*. On every such point, his habits and experience afford him facilities not possessed by any one else, for finding relevant and specific arguments, when the nature of the case affords any; but the surer he is of being able to find such arguments, if any such are to be found, the stronger the reason for treating his naked declaration of opinion as unworthy of all regard: accompanied by specific arguments, it is useless; destitute of them, it amounts to a virtual confession of their non-existence.

So matters stand on the question, what *ought* to be law?

On the question what the law *is*, so long as the rule of action is kept in the state of common, *alias* unwritten, *alias* imaginary law, authority, though next to nothing, is everything. The question is, what on a given occasion A (the judge) is likely to think: wait till your fortune has been spent in the inquiry, and you will know; but forasmuch as it is naturally a man's wish to be able to give a guess what the result will eventually be, before he has spent his fortune, in the view if possible to avoid spending his fortune, and getting nothing in return for it, he applies, through the medium of B (an attorney,) for an opinion to C (a counsel), who, considering what D (a former judge) has, on a subject supposed to be more or less analogous to the one in question, said or been supposed to say, deduces therefrom his guess as to what, when the time comes, judge A, he thinks, will say, and gives it you. A shorter way would be, to put the question at once to A; but, for obvious reasons, this is not permitted.

On many cases, again, as well-grounded a guess might be had of an astrologer for five shillings, as of a counsel for twice or thrice as many guineas, but that the lawyer considers the astrologer as a smuggler, and puts him down.

But Packwood's opinion on the goodness of his own razors would be a safer guide for judging of their goodness, than a judge's opinion on the goodness of a proposed law: it is Packwood's interest that his razors be as good as possible; — the judge's, that the law *be* as bad, yet *thought to be* as good, as possible. It would not be the judge's interest that his commodity should be thus bad, if, as in the case of Packwood, the customer had other shops to go to; but in this case, even when there are two shops to go to, the shops being in confederacy, the commodity is equally bad in both; and the worse the commodity, the better it is said to be. In the case of the judge's commodity, no experience suffices to undeceive men; the bad quality of it is referred to any cause but the true one.

Example 2. Churchmen; oppositeness of their interest to the universal interest.

In the lawyer's case it has been shown, that on the question, what on such or such a point *ought* to be law, — to refer to a lawyer's opinion, given without or against specific reasons, is a fallacy — its tendency, in proportion to the regard paid to it, deceptious; — the cause of this deceptious tendency, sinister interest, to the action of which all advocates and (being made from advocates) all judges stand exposed. To the churchman's case the same reasoning applies: as in the lawyer's case, the objection does not arise on the question, what law *is*, but what *ought to be* law, — so in the churchman's case, it does not arise as to what in matters of religion is law, but as to what in those matters ought to be law. On a question not connected with religion, reference to

a churchman's opinion as *such*, as authority, can scarcely be considered as a fallacy, such opinion not being likely to be considered as constitutive of authority. To understand how great would be the probability of deception, if on the question, what in matters of religion ought to be law, the unsupported opinion of a churchman were to be regarded as authority, we must develope the nature and form of the sinister interest by which any declaration of opinion from such a quarter is divested of all title to regard. The sources of a churchman's sinister interest are as follows: —

1. On entering into the profession, as condition precedent to advantage from it in the shape of subsistence and all other shapes, he makes of necessity a solemn and recorded declaration of his belief in the truth of 39 articles, framed 262 years ago — the date of which, the ignorance and violence of the time considered, should suffice to satisfy a reflecting mind of the impossibility of their being all of them really believed by any person at present.

2. In this declaration is generally understood to be included an engagement or undertaking, in case of original belief and subsequent change, never to declare, but if questioned, to deny such change.

3. In the institution thus established, he beholds shame and punishment attached to sincerity — rewards in the largest quantity to absurdity and insincerity. Now the presumptions resulting from such an application of reward and punishment, to engage men to declare assent to given propositions, are — 1st, That the proposition is not believed by the proposer; 2. Thence, that it is not true; 3. Thence, that it is not believed by the acceptor. It is impossible by reward or punishment to produce real and immediate belief: but the following effects may certainly be produced: — 1. The abstaining from any declaration of disbelief; 2. Declaration of belief; 3. The turning aside from all considerations tending to produce disbelief; 4. The looking out for, and fastening exclusive attention to, all considerations tending to produce belief — authority especially, by which a sort of vague and indistinct belief of the most absurd propositions has everywhere been produced.

On no other part of the field of knowledge are reward or punishment now-a-days considered as fit instruments for the production of assent or dissent. A schoolmaster would not be looked upon as sane, who, instead of putting Euclid's Demonstrations into the hands of his scholar, should, without the Demonstrations, put the Propositions into his hand, and give him a guinea for signing a paper declarative of his belief in them, or lock him up for a couple of days without food on his refusal to sign it. And so in chemistry, mechanics, husbandry, astronomy, or any other branch of knowledge. It is true, that in those parts of knowledge in which assent and dissent are left free, the importance of truth may be esteemed not so great as here, where it is thus influenced; but the more important the truth, the more flagrant the absurdity and tyranny of employing, for the propagation of it, instruments, the employment of which has a stronger tendency to propagate error than truth.

4. For teaching such religious truths as men are allowed to teach, together with such religious error as they are thus forced to teach, the churchman sees rewards allotted in larger quantities than are allotted to the most useful services. Of much of the matter of reward thus bestowed, the disposal is in the king's hands, with the power of applying it, and motives for applying it, to the purposes of parliamentary service, paying for habitual breach of trust, and keeping in corrupt and secret dependence on his agents, those agents of the people whose duty it is to sit as judges over the agents of the king. In Ireland, of nine tenths of those, on pretence of instructing whom this vast mass of reward is extorted, it is known, that, being by conscience precluded from hearing, it is impossible that they should derive any benefit from such instruction.

In Scotland, where government reward is not employed in giving support to it, Church-of-Englandism is reduced to next to nothing.

The opinions which, in this state of things, interest engages a churchman to support, are — 1. That reward to the highest extent has no tendency to promote insincerity, even where practicable, to an unlimited extent, and without chance of detection; 2. Or that money given in case of compliance, refused in case of non-compliance, is not reward for compliance; 3. Or that punishment applied in case of non-compliance, withheld in case of compliance, is not punishment; 4. Or that insincerity is not vice but virtue, and as such ought to be promoted; 5. That it is not merely consistent with, but requisite to, good government to extort money from poor and rich, to be applied as reward for doing nothing, or for doing but a small part of that which is done by others for a small proportion of the same reward, and this on pretence of rendering service, which nine-tenths of the people refuse to receive.

It is the interest of the persons thus engaged in a course of insincerity, that by the same means perseverance in the same course should be universal and perpetual; for suppose, in case of the reward being withheld, the number annually making the same declaration should be reduced to half: this would be presumptive evidence of insincerity on the part of half of those who made it before.

The more flagrant the absurdity, the stronger is each man's interest in engaging

as many as possible in joining with him in the profession of assent to it; for the greater the number of such co-declarants, the greater the number of those of whose professions the elements of authority are composed, and of those who stand precluded from casting on the rest the imputation of insincerity.

The following, then, are the abuses in the defence of which all churchmen are enlisted: 1. Perpetuation of immorality in the shape of insincerity; 2. Of absurdity in subjects of the highest importance; 3. Extortion inflicted on the many for the benefit of the few; 4. Reward bestowed on idleness and incapacity, to the exclusion of labour and ability; 5. The matter of corruption applied to the purposes of corruption in a constant stream; 6. In one of these kingdoms, a vast majority of the people kept in degradation, avowedly for no other than the above purposes. But whoever is engaged by interest in the support of any one government abuse, is engaged in the support of all, each giving to the others his support in exchange.

It being the characteristic of abuse to need and receive support from fallacy, it is the interest of every man who derives profit from abuse in any shape, to give the utmost currency to fallacy in every shape—viz. as well to those fallacies which render more particular service to others' abuses, as those which render such service to his own. It being the interest of each person so situated to give the utmost support to abuse, and the utmost currency to fallacy in every shape, it is also his interest to give the utmost efficiency to the system of education by which men are most effectually divested both of the power and will to detect and expose fallacies, and thence to suppress every system of education in proportion as it has a contrary tendency. Lastly, the stronger the interest by which a man is urged to give currency to fallacy, and thus to propagate deception, the more likely is it that such will be his endeavour: the less fit, therefore, will his opinion be to serve in the character of authority, as a standard and model for the opinions of others.

CHAPTER II.

THE WISDOM OF OUR ANCESTORS; OR CHINESE ARGUMENT — (*ad verecundiam.*)

§ 1. *Exposition.*

THIS argument consists in stating a supposed repugnancy between the proposed measure, and the opinions of men by whom the country of those who are discussing the measure was inhabited in former times; these opinions being collected either from the express words of some writer living at the period of time in question, or from laws or institutions that were then in existence.

"*Our wise ancestors*" — "*The wisdom of our ancestors*" — "*The wisdom of ages*" — "*Venerable antiquity*" — "*Wisdom of old times:*" —

Such are the leading terms and phrases of propositions, the object of which is to cause the alleged repugnance to be regarded as a sufficient reason for the rejection of the proposed measure.

§ 2. *Exposure.*

This fallacy affords one of the most striking of the numerous instances in which, under the conciliatory influence of *custom* — that is, of *prejudice* — opinions the most repugnant to one another are capable of maintaining their ground in the same intellect.

This fallacy, prevalent as it is in matters of law, is directly repugnant to a principle or maxim universally admitted in almost every other department of human intelligence, and which is the foundation of all useful knowledge and of all rational conduct.

"Experience is the mother of wisdom," is among the maxims handed down to the present and all future ages, by the wisdom, such as it has been, of past ages.

No! says this fallacy, the true mother of wisdom is not *experience*, but *inexperience*.

An absurdity so glaring carries in itself its own refutation; and all that we can do is, to trace the causes which have contributed to give to this fallacy such an ascendency in matters of legislation.

Among the several branches of the fallacies of authority, the cause of delusion is more impressive in this than in any other.

1. From inaccuracy of conception arises incorrectness of expression; from which expression, conception, being produced again, error, from having been a momentary cause, comes to be a permanent effect.

In the very denomination commonly employed to signify the portion of time to which the fallacy refers, is virtually involved a false and deceptious proposition, which, from its being employed by every mouth, is at length, without examination, received as true.

What in common language is called *old* time, ought (with reference to any period at which the fallacy in question is employed) to be called *young* or early time.

As between individual and individual living at the same time and in the same situation, he who is old possesses, as such, more experience than he who is young; — as between generation and generation, the reverse of this is true, if, as in ordinary language, a preceding generation be, with reference to a succeeding generation, called *old*, the *old* or preceding generation could not have had so much experience as the succeeding. With respect to such of the materials or sources of wisdom which have come under the cognizance of their own senses, the two are on a par; — with respect to such of those materials

and sources of wisdom as are derived from the reports of others, the later of the two possesses an indisputable advantage.

In giving the name of old or elder to the earlier generation of the two, the misrepresentation is not less gross, nor the folly of it less incontestable, than if the name of old man or old woman were given to the infant in its cradle.

What, then, is the wisdom of the times called old? Is it the wisdom of gray hairs? No: it is the wisdom of the cradle.*

The learned and honourable gentlemen of THIBET do homage to superior wisdom — superiority raised to the degree of divinity — in the person of an infant lying and squalling in his cradle.

The learned and honourable gentlemen of WESTMINSTER set down as impostors the LAMAS of THIBET, and laugh at the folly of the deluded people on whom such imposture passes for sincerity and wisdom.

But the worship paid at THIBET to the infant body of the present day, is, if not the exact counterpart, the type at least of the homage paid at WESTMINSTER to the infant minds of those who have lived in earlier ages.

2. Another cause of delusion which promotes the employment of this fallacy, is the reigning prejudice in favour of the dead — a prejudice which in former times contributed more than anything else to the practice of idolatry: the dead were speedily elevated to the rank of divinities; the superstitious invoked them, and ascribed a miraculous efficacy to their relics.

This prejudice, when examined, will be seen to be no less indefensible than pernicious — no less pernicious than indefensible.

By propagating this mischievous notion, and acting accordingly, the man of selfishness and malice obtains the praise of humanity and social virtue. With this jargon in his mouth, he is permitted to sacrifice the real interests of the living to the imaginary interests of the dead. Thus imposture, in this shape, finds in the folly or improbity of mankind a never-failing fund of encouragement and reward.

De mortuis nil nisi bonum; — WITH all its absurdity, the adage is but too frequently received as a leading principle of morals. Of two attacks, which is the more barbarous — on a man that does feel it, or on a man that does not? On the man that does feel it, says the principle of utility: on the man that does not, says the principle of caprice and prejudice — the principle of sentimentalism — the principle in which imagination is the sole mover — the principle in and by which feelings are disregarded as not worth notice.

The same man who bepraises you when dead, would have plagued you without mercy when living.

Thus as between Pitt and Fox. While both were living, the friends of each reckoned so many adversaries in the friends of the other. On the death of him who died first, his adversaries were converted into friends. At what price this friendship was paid for by the people, is no secret.† See the Statute Book, see the debates of the times, and see *Defence of Economy* against Burke and Rose.‡

The cause of this so extensively-prevalent and extensively-pernicious propensity lies not very deep.

A dead man has no rivals, — to nobody is he an object of envy: in whosesoever way he may have stood when living — when dead, he no longer stands in anybody's way. If he was a man of genius, those who denied him any merit during his life — even his very enemies, changing their tone all at once, assume an air of justice and kindness, which costs them nothing, and enables them, under pretence of respect for the dead, to gratify their malignity towards the living.

Another class of persons habitually exalt the past for the express purpose of depressing and discouraging the present generation.

It is characteristic of the same sort of persons, as well as of the same system of politics, to idolize, under the name of wisdom of our ancestors, the wisdom of untaught inexperienced generations, and to undervalue and cover with every expression of contempt that the language of pride can furnish, the supposed ignorance and folly of the great body of the people.‖

So long as they keep to vague generalities — so long as the two objects of comparison are each of them taken in the lump — wise ancestors in one lump, ignorant and foolish mob of modern times in the other — the weakness of the fallacy may escape detection. Let them but assign for the period of superior wisdom any determinate period whatsoever, not only will the groundlessness of the notion be apparent (class being compared with class in that period and the present one,) but, unless the antecedent period be, comparatively speaking a very modern one, so wide will be the disparity, and to such an amount in favour of modern times, that, in comparison of the lowest class of the people in modern times

* No one will deny that preceding ages have produced men eminently distinguished by benevolence and genius; it is to them that we owe in succession all the advances which have hitherto been made in the career of human improvement: but as their talents could only be developed in proportion to the state of knowledge at the period in which they lived, and could only have been called into action with a view to then-existing circumstances, it is absurd to rely on their authority, at a period and under a state of things altogether different.

† For the payment of Mr. Pitt's creditors was voted £40,000 of the public money: — to Mr. Fox's widow, £1500 a-year.

‡ Vol. V. p. 278, *et seq.*

‖ A "Burdett mob," for example.

always supposing them proficients in the art of reading, and their proficiency employed in the reading of newspapers,) the very highest and best informed class of these wise ancestors will turn out to be grossly ignorant.

Take, for example, any year in the reign of Henry the Eighth, from 1509 to 1546. At that time the House of Lords would probably have been in possession of by far the larger proportion of what little instruction the age afforded: in the House of Lords, among the laity, it might even then be a question whether without exception their Lordships were all of them able so much as to read. But even supposing them all in the fullest possession of that useful art, political science being the science in question, what instruction on the subject could they meet with at that time of day?

On no one branch of legislation was any book extant, from which, with regard to the circumstances of the then present times, any useful instruction could be derived: distributive law, penal law, international law, political economy, so far from existing as sciences, had scarcely obtained a name: in all those departments, under the head of *quid faciendum*, a mere blank: the whole literature of the age consisted of a meagre chronicle or two, containing short memorandums of the usual occurrences of war and peace, battles, sieges, executions, revels, deaths, births, processions, ceremonies, and other external events; but with scarce a speech or an incident that could enter into the composition of any such work as a history of the human mind—with scarce an attempt at investigation into causes, characters, or the state of the people at large. Even when at last, little by little, a scrap or two of political instruction came to be obtainable, the proportion of error and mischievous doctrine mixed up with it was so great, that whether a blank unfilled might not have been less prejudicial than a blank thus filled, may reasonably be matter of doubt.

If we come down to the reign of James the First, we shall find that Solomon of his time, eminently eloquent as well as learned, not only among the crowned but among uncrowned heads, marking out for prohibition and punishment the practices of devils and witches, and without any the slightest objection on the part of the great characters of that day in their high situations, consigning men to death and torment for the misfortune of not being so well acquainted as he was with the composition of the Godhead.

Passing on to the days of Charles the Second, even after Bacon had laid the foundations of a sound philosophy, we shall find Lord Chief-Justice Hale (to the present hour chief god of the man of law's idolatry) unable to tell (so he says himself) what *theft* was; but knowing at the same time too well what witchcraft was; hanging men with the most perfect complacency for both crimes, amidst the applauses of all who were wise and learned in that blessed age.

Under the name of Exorcism, the Catholic liturgy contains a form of procedure for driving out devils:—even with the help of this instrument, the operation cannot be performed with the desired success but by an operator qualified by holy orders for the working of this as so many other wonders.

In our days and in our country the same object is attained, and beyond comparison more effectually, by so cheap an instrument as a common newspaper: before this talisman, not only devils, but ghosts, vampires, witches, and all their kindred tribes, are driven out of the land, never to return again: the touch of holy water is not so intolerable to them as the bare smell of printers' ink.

If it is absurd to rely on the wisdom of our ancestors, it is not less so to vaunt their probity: they were as much inferior to us in that point as in all others; and the further we look back, the more abuses we shall discover in every department of government. Nothing but the enormity of those abuses has produced that degree of comparative amendment on which at present we value ourselves so highly. Till the human race was rescued from that absolute slavery under which nine-tenths of every nation groaned, not a single step could be made in the career of improvement; and, take what period we will in the lapse of preceding ages, there is not one which presents such a state of things as any rational man would wish to see entirely re-established.

Undoubtedly, the history of past ages is not wanting in some splendid instances of probity and self-devotion; but in the admiration which these excite, we commonly overrate their amount, and become the dupes of an illusion occasioned by the very nature of an extensive retrospect. Such a retrospect is often made by a single glance of the mind: in this glance, the splendid actions of several ages (as if for the very purpose of conveying a false estimate of their number and contiguity) present themselves, as it were, in a a lump, leaving the intervals between them altogether unnoticed. Thus groves of trees, which at a distance present the appearance of thick and impenetrable masses, turn out on nearer approach to consist of trunks widely separated from each other.

Would you, then, have us speak and act as if we had never had any ancestors? Would you because recorded experience, and along with it wisdom, increases from year to year, annually change the whole body of our laws? By no means: such a mode of reasoning and acting would be more absurd even than that which has just been exposed; and *provisional* adherence to existing establishments is grounded on considerations much more ra-

tional than a reliance on the wisdom of our ancestors. Though the *opinions* of our ancestors are as such of little value, their *practice* is not the less worth attending to; that is, in so far as their practice forms part of our own experience. However, it is not so much from what they did, as from what they underwent (good included, as well as evil,) that our instruction comes. Independently of consequences, what they did, is no more than evidence of what they thought; nor yet, in legislation, is it evidence of what they thought best for the whole community, but only of what the rulers thought would be best for themselves, in periods when every species of abuse prevailed, unmitigated by the existence of either public press or public opinion. From the facts of their times, much information may be derived — from the opinions, little or none. As to opinions, it is rather from those which were foolish, than from those which were well grounded, that any instruction can be derived. From foolish opinions comes foolish conduct; from the most foolish conduct, the severest disaster; and from the severest disaster, the most useful warning. It is from the folly, not from the wisdom of our ancestors, that we have so much to learn; and yet it is to their wisdom, and not to their folly, that the fallacy under consideration sends us for instruction.

It seems, then, that our ancestors, considering the disadvantages under which they laboured, could not have been capable of exercising so sound a judgment on their interests as we on ours: but as a knowledge of the facts on which a judgment is to be pronounced is an indispensable preliminary to the arriving at just conclusions, and as the relevant facts of the later period must all of them individually, and most of them specifically, have been unknown to the man of the earlier period, it is clear that any judgment derived from the authority of our ancestors, and applied to existing affairs, must be a judgment pronounced without evidence; and this is the judgment which the fallacy in question calls on us to abide by, to the exclusion of a judgment formed on the completest evidence that the nature of each case may admit.

Causes of the propensity to be influenced by this Fallacy.

Wisdom of ancestors being the most impressive of all arguments that can be employed in defence of established abuses and imperfections, persons interested in this or that particular abuse are most forward to employ it.

But their exertions would be of little avail, were it not for the propensity which they find on the part of their antagonists to attribute to this argument nearly the same weight as those by whom it is relied on.

This propensity may be traced to two intimately-connected causes:— 1. Both parties having been trained up alike in the school of the English lawyers, headed by Blackstone; and 2. Their consequent inability, for want of practice, to draw from the principle of general utility the justificative reason of everything that is susceptible of justification.

In the hands of a defender of abuse, authority answers a double purpose, by affording an argument in favour of any particular abuse which may happen to call for protection, and by causing men to regard with a mingled emotion of hatred and terror the principle of general utility, in which alone the true standard and measure of right and wrong is to be found.

In no other department of the field of knowledge and wisdom (unless that which regards religion be an exception) do leading men of the present times recommend to us this receipt for thinking and acting wisely. By no gentleman, honourable or right honourable, are we sent at this time of day to the wisdom of our ancestors for the best mode of marshalling armies, navigating ships, attacking or defending towns; for the best modes of cultivating and improving land, and preparing and preserving its products for the purposes of food, clothing, artificial light and heat; for the promptest and most commodious means of conveyance of ourselves and goods from one portion of the earth's surface to another; for the best modes of curing, alleviating, or preventing disorders in our own bodies, and those of the animals which we contrive to apply to our use.

Why this difference? Only because, in any other part of the field of knowledge, legislation excepted (and religion, in so far as it has been taken for the subject of legislation,) leading men are not affected with that sinister interest which is so unhappily combined with power in the persons of those leading men who conduct governments as they are generally at present established.

Sir H. Davy has never had anything to gain, either from the unnecessary length, the miscarriage, or the unnecessary part of the expenses attendant on chemical experiments; he therefore sends us either to his own experiments, or to those of the most enlightened and fortunate of his contemporaries, and not to the notions of Stahl, Van Helmont, or Paracelsus.

CHAPTER III.

1. *Fallacy of Irrevocable Laws.*
2. *Fallacy of Vows — (ad superstitionem.)*

THE two fallacies brought to view in this chapter are intimately connected, and require to be considered together: the object in view

is the same in both — the difference lies only in the instrument employed; and both of them are in effect the fallacy of *the wisdom of our ancestors*, pushed to the highest degree of extravagance and absurdity.

The object is to tie up the hands of future legislators by obligations supposed to be indissoluble.

In the case of the fallacy derived from the alleged irrevocable nature of certain laws, or to speak briefly, the fallacy of *Irrevocable laws*, the instrument employed is a contract — a contract entered into by the ruling powers of the state in question, with the ruling powers of some other party. This other party may be either the sovereign of some other state, or the whole or some part of the people of the state in question.

In the case of the fallacy derived from *vows*, a supernatural power is called in and employed in the character of guarantee.

Fallacy of Irrevocable Laws.

Exposition. — A law, no matter to what effect, is proposed to a legislative assembly, and, no matter in what way, it is by the whole or a majority of the assembly regarded as being of a beneficial tendency. The fallacy in question consists in calling upon the assembly to reject it notwithstanding, upon the single ground, that by those who in some former period exercised the power which the present assembly is thus called on to exercise, a regulation was made, having for its object the precluding for ever, or to the end of a period not yet expired, all succeeding legislators from enacting a law to any such effect as that now proposed.

What will be tolerably clear to every man who will allow himself to think it so, is — that, notwithstanding the profound respect we are most of us so ready to testify towards our fellow-creatures as soon as the moment has arrived after which it can be of no use to them, the comforts of those who are out of the way of all the comforts we can bestow, as well as of all the sufferings we can inflict, are not the real objects to which there has been this readiness to sacrifice the comforts of present and future generations, and that therefore there must be some other interest at the bottom.

Exposure. — 1. To consider the matter in the first place on the ground of general utility.

At each point of time, the sovereign for the time possesses such means as the nature of the case affords, for making himself acquainted with the exigencies of his own time.

With relation to the future, the sovereign has no such means of information; it is only by a sort of vague anticipation — a sort of rough and almost random guess drawn by analogy, that the sovereign of this year can pretend to say what will be the exigencies of the country this time ten years.

Here, then, to the extent of the pretended immutable law, is the government transferred from those who possess the best possible means of information, to those who, by their very position, are necessarily incapacitated from knowing anything at all about the matter.

Instead of being guided by their own judgment, the men of the nineteenth century shut their own eyes, and give themselves up to be led blindfold by the men of the eighteenth century.

The men who have the means of knowing the whole body of the facts, on which the correctness and expediency of the judgment to be formed must turn, give up their own judgment to that of a set of men entirely destitute of any of the requisite knowledge of such facts.

Men who have a century more of experience to ground their judgments on, surrender their intellect to men who had a century less experience, and who, unless that deficiency constitutes a claim, have no claim to preference.

If the prior generation were, in respect of intellectual qualification, ever so much superior to the subsequent generation, — if it understood so much better than the subsequent generation itself, the interest of that subsequent generation, — could it have been in an equal degree anxious to promote that interest, and consequently equally attentive to those facts with which, though in order to form a judgment it ought to have been, it is impossible that it should have been acquainted? In a word, will its love for that subsequent generation be quite so great as that same generation's love for itself?

Not even here, after a moment's deliberate reflection, will the assertion be in the affirmative.

And yet it is their prodigious anxiety for the welfare of their posterity that produces the propensity of these sages to tie up the hands of this same posterity for evermore, to act as guardians to its perpetual and incurable weakness, and take its conduct for ever out of its own hands.

If it be right that the conduct of the 19th century should be determined not by its own judgment but by that of the 18th, it will be equally right that the conduct of the 20th century should be determined not by its own judgment but by that of the 19th.

The same principle still pursued, what at length would be the consequence? That in process of time, the practice of legislation would be at an end: the conduct and fate of all men would be determined by those who neither knew nor cared anything about the matter; and the aggregate body of the living

would remain for ever in subjection to an inexorable tyranny, exercised, as it were, by the aggregate body of the dead.

This irrevocable law, whether good or bad at the moment of its enactment, is found at some succeeding period to be productive of mischief — uncompensated mischief — to any amount. Now, of this mischief, what possibility has the country of being rid?

A despotism, though it were that of a Caligula or a Nero, might be to any degree less mischievous, less intolerable, than any such immutable law. By benevolence (for even a tyrant may have his moments of benevolence,) by benevolence, by prudence — in a word, by caprice — the living tyrant might be induced to revoke his law, and release the country from its consequences. But the dead tyrant! who shall make *him* feel? who shall make *him* hear?

Let it not be forgotten, that it is only to a bad purpose that this and every other instrument of deception will in general be employed.

It is only when the law in question is mischievous, and generally felt and understood to be such, that an argument of this stamp will be employed in the support of it.

Suppose the law a good one, it will be supported, not by absurdity and deception, but by reasons drawn from its own excellence.

But is it possible that the restraint of an irrevocable law should be imposed on so many millions of living beings by a few scores, or a few hundreds, whose existence has ceased? — can a system of tyranny be established, under which the living are all slaves, and a few among the dead, their tyrants?

The production of any such effect in the way of constraint being physically impossible, — if produced in any degree, it must be by force of argument — by the force of fallacy, and not by that of legislative power.

The means employed to give effect to this device may be comprised under two heads; the first of them exhibiting a contrivance not less flagitious than the position itself is absurd.

1. In speaking of a law which is considered as repugnant to any law of the pretended immutable class, the way has been to call it void. But to what purpose call it void? Only to excite the people to rebellion in the event of the legislator's passing any such void law. In speaking of a law as void, either this is meant or nothing. It is a sophism of the same cast as that expressed by the words *rights of man*, though played off in another shape, by a different set of hands, and for the benefit of a different class.

Are the people to consider the law void? They are then to consider it as an act of injustice and tyranny under the name of law; — as an act of power exercised by men who have no right to exercise it: they are to deal by it as they would by the command of a robber; they are to deal by those who, having passed it, take upon them to enforce the execution of it, as they would deal, whenever they found themselves strong enough, by the robber himself.*

2. The other contrivance for maintaining the immutability of a given law, is derived from the notion of a contract or engagement. The faithful observance of contracts being one of the most important of the ties that bind society together, an argument drawn from this source cannot fail to have the appearance of plausibility.

But be the parties interested who they may, a contract is not itself an end — it is but a means toward some end; and in cases where the public is one of the parties concerned, it is only in so far as that end consists of the happiness of the whole community, taken in the aggregate, that such contract is worthy to be observed.

Let us examine the various kinds of contract to which statesmen have endeavoured to impart this character of perpetuity: — 1. Treaties between state and foreign state, by which each respectively engages its government and people; 2. Grant of privileges from the sovereign to the whole community in the character of subjects; 3. Grant of privileges from the sovereign to a particular class of subjects; 4. New arrangement of power between different portions or branches of the sovereignty, or new declaration of the rights of the community; 5. Incorporative union between two sovereignties having or not having a common head.

Take, then, for the subject and substance of the contract, any one of these arrangements: so long as the happiness of the whole community, taken in the aggregate, is in a greater degree promoted by the exact observance of the contract, than it would be by any alteration, exact ought to be the observance: — on the contrary, if, by any given change, the aggregate of happiness would be in a greater degree promoted than by the exact observance, such change ought to be made.

True it is, that, considering the alarm and danger which is the natural result of every breach of a contract to which the sovereignty is party, in case of any change with respect to such contract, the aggregate of public happiness will be in general rather diminished than promoted, unless, in case of disadvantage produced to any party by the change, such disadvantage be made up by adequate compensation.

* Lord Coke was for holding void every act contrary to Magna Charta. If his doctrine were tenable, every act imposing law-taxes would be void.

Let it not be said that this doctrine is a dangerous doctrine, because the compensation supposed to be stipulated for as adequate, may prove but a nominal, or at best but an inadequate, compensation. Reality and not pretence, probity not improbity, veracity not mendacity, are supposed alike on all sides; — the contract a real contract, the change a real change, the compensation an adequate as well as real compensation. Instead of probity, suppose improbity in the sovereignty; it will be as easy to deny the existence, or explain away the meaning of the contract, or to deny or explain away the change, as, instead of a real to give a nominal, instead of an adequate to give an inadequate, compensation.

To apply the foregoing principles to the cases above enumerated, one by one: —

1. In the case of the contract or treaty between state and foreign state, the dogma of immutability has seldom been productive of any considerable practical inconvenience: the ground of complaint has arisen rather from a tendency to change than a too rigid adherence to the treaty.

However, some commercial treaties between state and state, entered into in times of political ignorance or error, and pernicious to the general interests of commerce, are frequently upheld under a pretence of regard for the supposed inviolability of such contracts, but in reality from a continuance of the same ignorance, error, antipathy or sinister interest, which first occasioned their existence. It can seldom or never happen that a forced direction thus given to the employment of capital can ultimately prove advantageous to either of the contracting parties; and when the pernicious operation of such a treaty on the interests of both parties has been clearly pointed out, there can be no longer any pretence for continuing its existence. Notice, however, of any proposed departure from the treaty, ought to be given to all the parties concerned; sufficient time should be afforded to individuals engaged in traffic, under the faith of the treaty, to withdraw, if they please, their capitals from such traffic, and in case of loss, compensation as far as possible ought to be afforded.

2. Grant of privilege from the sovereign to the whole community in the character of subjects.—If, by the supposed change, privileges to equal value be given in the room of such as are abrogated, adequate compensation is made: if greater privileges are substituted, there is the greater reason for supporting the measure.

3. Grant of privileges from the sovereign to a particular class of subjects.

No such particular privilege ought to have been granted, if the aggregate happiness of the community was likely to be thereby diminished: but, unless in case of a revocation, adequate compensation be here also made, the aggregate happiness of the community will not be increased by the change; the happiness of the portion of the community to be affected by the change, being as great a part of the aggregate happiness as that of any other portion of equal extent.

Under this head are included all those more particular cases in which the sovereign contracts with this or that individual, or assemblage of individuals, for money or money's worth, to be supplied, or service otherwise to be rendered.

4. New arrangement or distribution of powers, as between different portions or branches of the sovereignty, or new declaration of the rights of the community.

Let the supposition be, that the result will not be productive of a real addition to the aggregate stock of happiness on the part of the whole community, — it ought not to be made: let the supposition be the reverse, — then, notwithstanding the existence of the contract, the change is such as it is right and fitting should be made.

The first of these can never furnish a case for compensation, unless in so far as, without charge or disadvantage to the people, the members of the sovereignty can contrive to satisfy one another; such members of the sovereignty being, as to the rest of the community, not proprietors but trustees.

The frame or constitution of the several American United States, so far from being declared immutable or imprescriptible, contains an express provision, that a convention shall be holden at intervals for the avowed object of revising and improving the constitution, as the exigencies of succeeding times may require. In Europe, the effect of declaring this or that article in a new distribution of powers, or in the original frame of a constitution, immutable, has been to weaken the sanction of all laws. The article in question turns out to be mischievous or impracticable; instead of being repealed, it is openly or covertly violated; and this violation affords a precedent or pretext for the non-observance of arrangements clearly calculated to promote the aggregate happiness of the community.

5. Case of an incorporative union between two sovereignties, having or not having a common head.

Of all the cases upon the list, this is the only one which is attended with difficulty.

This is the case in which, at the same time that a contract with detailed clauses is at once likely and fit to be insisted on, compensation, that compensation without which any change would not be consistent with general utility in the shape of justice or in any other shape, is an operation attended with more difficulty than in any other of these cases.

Distressing indeed would be the difficulty,

were it not for one circumstance which happily is interwoven in the very nature of the case.

At the time of the intended union, the two states (not to embarrass the case by taking more than two at a time) are, with relation each to the other, in a greater or less degree foreign and independent states.

Of the two uniting states, one will generally be more, the other less, powerful. If the inequality be considerable, the more powerful state, naturally speaking, will not consent to the union, unless, after the union, the share it possesses in the government of the new-framed compound state be greater by a difference bearing some proportion to the difference in prosperity between the two states.

On the part of the less powerful state, precautions against oppression come of course.

Wherever a multitude of human beings are brought together, there is but too much room for jealousy, suspicion, and mutual ill-will.

In the apprehension of each, the others, if they obtain possession of the powers exercised by the common government, will be supposed to apply them unjustly. In men or in money, in labour or in goods, in a direct way or in some indirect one, it may be the study of the new compound government, under the influence of that part of the quondam government which is predominant in it, to render the pressure of the contributions proportionably more severe upon the one portion of the new compounded state than upon the other, or to force upon it new customs, new religious ceremonies, new laws.

Let the hands of the new government remain altogether loose: one of the two compound nations may be injured and oppressed by the other.

Tie up the hands of the government in such degree as is requisite to give to each nation a security against injustice at the hands of the other: sooner or later comes the time in which the inconveniences resulting from the restriction will become intolerable to one or other, or to both.

But sooner or later the very duration of the union produces the natural remedy.

Sooner or later, having for such or such a length of time been in the habit of acting in subjection to one government, the two nations will have become melted into one, and mutual apprehensions will have been dissipated by conjunct experience.

All this while, in one or both of the united states, the individuals will be but too numerous and too powerful, who by sinister interest and interest-begotten prejudice will stand engaged to give every possible countenance and intensity to those fears and jealousies — to oppose to the entire composure of them every degree of retardation.

If in either of the united communities, at the time of the union, there existed a set of men more or less numerous and powerful, to whom abuse or imperfection in any shape was a source of profit; whatsoever restrictions may have been expressed in the contract, these restrictions will of course be laid hold of by the men thus circumstanced, and applied as far as possible to the giving protection and continuance to a state of things agreeable or beneficial to themselves.

At the time of the union between England and Scotland, the Tory party, of whom a large proportion were Jacobites, and all or most of them high-churchmen, had acquired an ascendant in the House of Commons.

Here, then, a favourable occasion presented itself to these partisans of Episcopacy, for giving perpetuity to the triumph they had obtained over the English Presbyterians, by the Act of Uniformity proclaimed in the time of Charles the Second.*

In treaties between unconnected nations, where an advantage in substance is given to one, for the purpose of saving the honour of the other, it has been the custom to make the articles bear the appearance of reciprocity upon the face of them; as if, the facilitating the vent of French wines in England being the object of a treaty, provision were made in it that wine of the growth of either country might be imported into the other, duty free.

By the combined *astutia* of priestcraft and lawyercraft, advantage was taken of this custom to rivet for ever those chains of ecclesiastical tyranny which, in the precipitation that attended the restoration, had been fastened upon the people of England. For securing the 45 Scotch members from being outnumbered by the 513 English ones, provision had been made in favour of the church of Scotland: therefore, on the principle of reciprocity, for securing the 513 English members from being outnumbered by the 45 Scotch ones, like provision was made in favour of the church of England.

Blackstone avails himself of this transaction for giving perpetuity to whatever imperfections may be founded in the ecclesiastical branch of the law, and the official establishment of England.

On a general account which he has been giving,† of the articles and act of union, he grounds three observations: —

1. "That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions" of the union.

* 13 & 14 Ch. II. c. 4. † Vol. I. 97, 9

2. "That, whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be.

3. "That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England (unless with the consent of the respective churches collectively or representatively given,) would be an infringement of these "fundamental and essential conditions," and greatly endanger the union."

On the original device, an improvement has, we see, been made by the ingenuity of the orthodox and learned commentator. If —as for example, by the alteration of any of the 39 articles—if, by the abolition of any of the English ecclesiastical sinecures, or by any efficient measure for ensuring the performance of duty in return for salary, the ecclesiastical branch of the English official establishment were brought so much the nearer to what it is in Scotland, the Scotch, fired by the injury done to them, would cry out, A breach of faith! and call for a dissolution of the union.

To obviate this *danger*—a *great* one he denominates it—his ingenuity, in concert with his piety, has however furnished us with an expedient:—"The consent of the church, collectively or representatively given," is to be taken; by which is meant, if anything, that by the revival of the convocation, or some other means, the clergy of England are to be erected into a fourth estate.

What is evident is, that unless the sinister influence of the Crown could be supposed to become *felo de se*, and employ itself in destroying a large portion of itself, nothing but a sincere persuasion of the utility of a change in relation to any of the points in question, and that entertained by a large proportion of the English members in each House, could ever be productive of any such change;—that, in any attempt to force the discipline of the church of Scotland upon the church of England, the 45 Scotch members in the House of Commons, supposing them all unanimous, would have to outnumber, or somehow or other to subdue, the 513 English ones;—that in the House of Lords, the 16 Scotch members, supposing all the lay lords indifferent to the fate of the church of England, would in like manner have to outnumber the 26 bishops and archbishops.

But the Tories, who were then in vigour, feared that they might not always be so, and seized that opportunity to fetter posterity by an act which should be deemed irrevocable.

The "administration of justice in Scotland."* This forms the subject of the 19th article, which has for its *avowed* object the securing the people of Scotland against any such encroachments as might otherwise be made by the lawyers of England, by the use of those fictions and other frauds, in the use of which they had been found so expert. But throughout the whole course of this long article, the most rational and uniform care is taken to avoid all such danger as that of depriving the people of Scotland of such benefit as, from time to time, they might stand a chance of receiving at the hands of the united parliament, by improvements in the mode of administering justice: "subject to such regulations as shall be made by the parliament of Great Britain," is a clause over and over again repeated.

It would have been better for Scotland, if on the subject of the next article, viz. "heritable offices," including "heritable jurisdictions," the like wisdom had presided. By that short article, those public trusts, together, with others therein mentioned, are, on the footing of "rights of property," reserved to the owners; yet still without any expression of that fanatic spirit which, on the field of religion, had in the same statute occupied itself in the endeavour to invest the conceits of mortal man with the attribute of immortality.

Nine-and-thirty years after, came the act† for abolishing these same heritable jurisdictions. Here was an act made in the very teeth of the act of union.

Mark now the sort of discernment, or of sincerity, that is to be learnt from Blackstone.

In a point-blank violation of the articles of union, in the abolition of those heritable jurisdictions which it was the declared object of one of its articles (20) to preserve, he saw nothing to "*endanger the union.*"

But suppose any such opinion to prevail, as that it is not exactly true, that by the mere act of being born, every human being merits *damnation*‡ (if by damnation be meant everlasting torment, or punishment in any other shape,) and a corresponding alteration were made in the set of propositions called the thirty-nine articles, the union would be "greatly endangered."

Between twenty and thirty years afterwards, at the suggestion of an honest member of the Court of Session, came upon the carpet, for the first time, the idea of applying remedies to some of the most flagrant imperfections in the administration of Scottish justice; and thereupon came out a pamphlet from James

* 5 Ann, c. 8. art. 19, anno 1708.

† "Abolishing the heritable jurisdictions in Scotland" are so many words that stand in the title of it. Anno 1747, 20 Geo. II. c. 43.

‡ Art. 9.

Boswell, declaiming, in the style of schoolboy declamation, on the injury that would be done to the people of Scotland by rendering justice, or what goes by that name, a little less inaccessible to them, and the breach that would be made in the faith plighted by that treaty, which, to judge from what he says of it, he had never looked at.

Again, in 1806, when another demonstration was made of applying a remedy to the abuses and imperfections of the system of judicature in Scotland, everything that could be done in that way was immediately reprobated by the Scotch lawyers as an infringement of that most sacred of all sacred bonds — the union: nor, for the support of the brotherhood on the other side of the Tweed, was a second sight of the matter in the same point of view wanting in England.

As to any such design as that of oppressing their fellow-subjects in Scotland, nothing could be further from the thoughts of the English members; neither for good nor for evil uses, was any expense of thought bestowed upon the matter: the ultimate object, as it soon became manifest, was the adding an item or two to the list of places.

Upon the whole, the following is the conclusion that seems to be dictated by the foregoing considerations. Every arrangement by which the hands of the sovereignty for the time being are attempted to be tied up, and precluded from giving existence to a fresh arrangement, is absurd and mischievous; and, on the supposition that the utility of such fresh arrangement is sufficiently established, the existence of a prohibitive clause to the effect in question ought not to be considered as opposing any bar to the establishment of it.

True it is, that all laws, all political institutions, are essentially dispositions for the future; and the professed object of them is, to afford a steady and permanent security to the interests of mankind. In this sense, all of them may be said to be framed with a view to perpetuity; but *perpetual* is not synonymous with *irrevocable;* and the principle on which all laws ought to be, and the greater part of them have been, established, is that of *defeasible perpetuity;* a perpetuity defeasible only by an alteration of the circumstances and reasons on which the law is founded.

To comprise all in one word — reason, and that alone, is the proper anchor for a law, for everything that goes by the name of law. At the time of passing his law, let the legislator deliver, in the character of reasons, the considerations by which he was led to the passing of it.*

This done, so long as in the eyes of the succeeding legislators the state of facts on which the reasons are grounded appears to continue without material change, and the reasons to appear satisfactory, so long the law continues: but no sooner do the reasons cease to appear satisfactory, or the state of the facts to have undergone any such change as to call for an alteration in the law, than an alteration in it, or the abrogation of it, takes place accordingly.

A declaration or assertion that this or that law is immutable, so far from being a proper instrument to insure its permanency, is rather a presumption that such law has some mischievous tendency.

The better the law, the less is any such extraneous argument likely to be recurred to for the support of it; the worse the law, and thence the more completely destitute of all intrinsic support, the more likely is it that support should be sought for it from this extraneous source.

But though it is the characteristic tendency of this instrument to apply itself to bad laws in preference to good ones, there is another, the tendency of which is to apply itself to good ones in preference to bad: this is what may be termed justification; the practice of annexing to each law the considerations by which, in the character of *reasons*, the legislator was induced to adopt it;† a a practice which, if rigidly pursued, must at no distant interval put an exclusion on all bad laws.

To the framing of laws, so constituted, that, being good in themselves, an accompaniment of good and sufficient reasons should also be given for them, there would be requisite, in the legislator, a probity not to be diverted by the action of sinister interest, and intelligence adequate to an enlarged comprehension and close application of the principle of general utility: in other words, the principle of the greatest happiness of the greatest number.

But to draw up laws without reasons, and laws for which good reasons are not in the nature of the case to be found, requires no more than the union of will and power.

The man who should produce a body of good laws with an accompaniment of good reasons, would feel an honest pride at the prospect of holding thus in bondage a succession of willing generations: his triumph would be to leave them the power, but to deprive them of will, to escape. But to the champions of abuse, by whom, amongst other devices, the conceit of immutable laws is played off against reform, in whatever shape it presents itself, every use of reason is as

* For a specimen, see *Essay on the Promulgation of Laws*, Vol. I. p. 155, *et seq.*

† See Vol. I. p. 155, *et seq.*; and *Papers on Codification, and Letters to the United States*, in Vol. IV.

odious as the light of the sun to moles and burglars.

2. *Vows or Promissory Oaths.*

The object in this fallacy is the same as in the preceding: but to the absurdity involved in the notion of tying up the hands of generations yet to come, is added, in this case, that which consists in the use sought to be made of supernatural power: the arm pressed into the service is that of the invisible and supreme ruler of the universe.

The oath taken, the formularies involved in it being pronounced, — is or is not the Almighty bound to do what is expected of him? Of the two contradictory propositions, which is it that you believe?

If he is *not* bound, then the security, the sanction, the obligation, amounts to nothing.

If he *is* bound, then observe the consequence: — the Almighty is bound; and by whom bound? Of all the worms that crawl about the earth in the shape of men, there is not one who may not thus impose conditions on the supreme ruler of the universe.

And to what is he bound? To any number of contradictory and incompatible observances which legislators, tyrants, or madmen, may, in the shape of an oath, be pleased to assign.

Eventual, it must be acknowledged, and no more, is the power thus exercised over, the task thus imposed upon, the Almighty. So long as the vow is kept, there is nothing for him to do. True: but no sooner is the vow broken, than his task commences — a task which consists in the inflicting on him by whom the vow is broken, a punishment which, when it is inflicted, is of no use in the way of example, since nobody ever sees it.

The punishment, it may be said, when inflicted, will be such exactly, as in the judgment of the almighty and infallible judge, will be best adapted to the nature of the offence.

Yes: but what offence? Not the act which the oath was intended to prevent, for that act may be indifferent, or even meritorious; and, if criminal, ought to be punished independently of the oath: the only offence peculiar to this case, is the profanation of a ceremony; and the profanation is the same, whether the act by which the profanation arises be pernicious or beneficial.

It is in vain to urge, in this or that particular instance, in proof of the reasonableness of the oath, the reasonableness of the prohibition or command which it is thus employed to perpetuate.

The objection is to the principle itself: to any idea of employing an instrument so unfit to be employed.

No sort of security is given, or can be given, for the applying it to the most beneficial purpose, rather than to the most pernicious.

On the contrary, it is more likely to be applied to a pernicious than to a beneficial purpose;

Because, the more manifestly and undeniably beneficial the observance of the prohibition in question would be in the eyes of future generations, the more likely is the prohibition to be observed, independently of the oath: as, on the other hand, the more likely the prohibition is not to be observed otherwise, the greater is the demand for a security of this extraordinary complexion to enforce the observance.

We come now to the instance in which, by the operation of the fallacy here in question, the ceremony of an oath has been endeavoured to be applied to the perpetuation of misrule.

Among the statutes passed in the first parliament of William and Mary, is one entitled "An Act for establishing the Coronation Oath."*

The form in which the ceremony is performed is as follows: — By the archbishop or bishop, certain questions are put to the monarch; and it is of the answers given to these questions that the oath is composed.

Of these questions, the third is as follows — "Will you, to the utmost of your power, maintain the laws of God, the true profession of the Gospel, and the protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?"

Answer: "All this I promise to do."

After this, anno 1706, comes the Act of Union, in the concluding article of which it is said, "That after the demise of her Majesty . . . . the sovereign next succeeding to her Majesty in the royal government of the kingdom of Great Britain, and so for ever hereafter, every king or queen succeeding and coming to the royal government of the kingdom of Great Britain, at his or her coronation, shall in the presence," &c. "take and subscribe an oath to maintain and preserve inviolably the said settlement of the church, and the doctrine, worship, discipline and government thereof, as by law established, within the kingdoms of England and Ireland, the dominion of Wales, and town of Berwick-upon-Tweed, and the territories thereunto belonging."†

A notion was once started, and upon occasion may but too probably be broached again, that by the above clause in the coronation oath, the king stands precluded from joining in the putting the majority of the Irish upon

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* 1 W. & M. c. 6, anno 1688.

† 5 Ann, c. 8, art. 25, § 8.

an equal footing with the minority, as well as from affording to both together relief against the abuses of the ecclesiastical establishment of that country.

In relation to this notion, the following propositions have already, it is hoped, been put sufficiently out of doubt: —

1. That it ought not to be in the power of the sovereignty to tie up its own hands, or the hands of its successors.

2. That, on the part of the sovereignty, no such power can have existence, either here or anywhere else.

3. That, therefore, all attempts to exercise any such power are, in their own nature, to use the technical language of lawyers, null and void.

4. Another, which will, it is supposed, appear scarcely less clear, is, that no such anarchical wish or expectation was entertained by the framers of the oath.

The proposition maintained is, that to any bills, to the effect in question, the monarch is, by this third and last clause in the oath, precluded from giving his assent: if so, he is equally precluded from giving his assent to any bills, to any proposed laws whatever.

It is plainly in what is called his executive, and not in his legislative capacity, that the obligation in question was meant to attach upon the monarch.

So loose are the words of the act, that if they were deemed to apply to the monarch in his legislative capacity, he might find in them a pretence for refusing assent to almost anything he did not like.

If by this third clause he stands precluded from consenting to any bill, the effect of which would be to abolish or vary any of the "rights" or "privileges" appertaining to the bishops or clergy, or "any of them," then by the first clause he stands equally precluded from giving his concurrence to any law, the effect of which would be to abolish or change any other rights. For by this first clause he is made "solemnly" to "promise and swear to govern the people . . . . according to the statutes in parliament agreed on, and the laws and customs of the same." After this, governing according to any new law, he could not govern according to the old law abrogated by it.

If, by any such ceremony, misrule in this shape could be converted into a duty or a right, so might it in any other.

If Henry VIII. at his coronation had sworn to "maintain" that Catholic "religion," which for so many centuries was "established by law," and by fire and sword to keep out the Protestant religion, and had been considered bound by such oath, he could never have taken one step towards the Reformation, and the religion of the state must have been still Catholic.

But would you put a force upon the conscience of your sovereign? By any construction, which in your judgment may be the proper one, would you preclude him from the free exercise of his?

Most assuredly not — even were it as completely within as it is out of my power.

All I plead for is, that on so easy a condition as that of pronouncing the word *conscience*, it may not be in his power either to make himself absolute, or in any shape to give continuance to misrule.

Let him but resign his power, conscience can never reproach him with any misuse of it.

It seems difficult to say what can be a misuse of it, if it be not a determinate and persevering habit of using it in such a manner as in the judgment of the two houses is not "conducive," but repugnant "to the utility of the subjects," with reference to whom, and whose utility alone, either laws or kings can be of any use.

According to the form in which it is conceived, any such engagement is in effect either a check or a licence: — a licence under the appearance of a check, and for that very reason but the more efficiently operative.

Chains to the man in power? Yes: but such as he figures with on the stage — to the spectators as imposing, to himself as light as possible. Modelled by the wearer to suit his own purposes, they serve to rattle, but not to restrain.

Suppose a king of Great Britain and Ireland to have expressed his fixed determination, in the event of any proposed law being tendered to him for his assent, to refuse such assent, and this not on the persuasion that the law would not be "for the utility of the subjects," but that by his coronation oath he stands precluded from so doing, — the course proper to be taken by parliament, the course pointed out by principle and precedent would be, a vote of abdication — a vote declaring the king to have abdicated his royal authority, and that, as in case of death or incurable mental derangement, now is the time for the person next in succession to take his place.

In the celebrated case in which a vote to this effect was actually passed, the declaration of abdication was in lawyer's language a fiction, — in plain truth a falsehood, — and that falsehood a mockery; not a particle of his power was it the wish of James to abdicate, to part with; but to increase it to a maximum, was the manifest object of all his efforts.

But in the case here supposed, with respect to a part, and that a principal part, of the royal authority, the will and purpose to abdicate is actually declared: and this, being such a part, without which the remainder cannot, "to the utility of the subjects," be

exercised, the remainder must of necessity be, on their part and for their sake, added.*

CHAPTER IV.

NO-PRECEDENT ARGUMENT — (*ad verecundiam.*)

Exposition. — "The proposition is of a novel and unprecedented complexion: the present is surely the first time that any such thing was ever heard of in this house."

Whatsoever may happen to be the *subject* introduced, above is a specimen of the infinite variety of forms in which the opposing *predicate* may be clothed.

To such an observation there could be no objection, if the object with which it were made was only to fix attention to a new or difficult subject: "Deliberate well before you act, as you have no precedent to direct your course."

Exposure. — But in the character of an argument, as a ground for the rejection of the proposed measure, it is obviously a fallacy.

Whether or no the alleged novelty actually exists, is an inquiry which it can never be worth while to make.

That it is impossible that it should in any case afford the smallest ground for the rejection of the measure, — that the observation is completely irrelevant in relation to the question, whether or no it is expedient that such a measure should be adopted, — is a proposition to which it seems difficult to conceive how an immediate assent can be refused. If no specific good is indicated as likely to be produced by the proposed measure, this deficiency is itself sufficient to warrant the rejection of it. If any such specific good *is* indicated, it must be minute indeed, if an observation of this nature can afford a sufficient ground for the rejection of the measure.

If the observation presents a conclusive objection against the particular measure proposed, so it would against any other that ever was proposed, including every measure that ever was adopted, and therein every institution that exists at present. If it proves that this ought not to be done, it proves that nothing else ought ever to have been done.

It may be urged, that if the measure had been a fit one, it would have been brought upon the carpet before. But there are several obstacles, besides the inexpediency of a measure, which, for any length of time, may prevent its being brought forward: —

1. If, though beyond dispute promotive of the interest of the many, there be anything in it that is adverse to the interests, the prejudices, or the humours of the ruling few, the wonder is, not that it should not have been brought forward before, but that it should be brought forward even now.

2. If in the complexion of it there be anything which it required a particular degree of ingenuity to contrive and adapt to the purpose, this would of itself be sufficient to account for the tardiness of its appearance.

In legislation, the birth of ingenuity is obstructed and retarded by difficulties beyond any which exist in other matters. Besides the more general sinister interest of the powerful few in whose hands the functions of government are lodged, the more particular sinister interest affecting the body of lawyers, is one to which any given measure, in proportion to the ingenuity displayed in it, is likely to be adverse.

Measures which come under the head of

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* The variety of the notions entertained at different periods, in different stages of society, respecting the duration of laws, presents a curious and not uninstructive picture of human weakness.

1. At one time we see, under the name of king, a single person, whose will makes law, or at any rate, without whose will no law is made; and when this lawgiver dies, his laws die with him.

Such was the state of things in Saxon times, — such even continued to be the state of things for several reigns after the Norman conquest.[a]

2. Next to this comes a period in which the duration of the law, during the lifetime of the monarch to whom it owed its birth, was unsettled and left to chance.[b]

3. In the third place comes the period in which the notions respecting the duration of the law concur with the dictates of reason and utility—not so much from reflection, as because no occasion of a nature to suggest and urge any attempt so absurd as that of tyrannizing over futurity, had as yet happened to present itself.

4. Lastly, upon the spur of an occasion of the sort in question, comes the attempt to give eternity to human laws.

Provisional and eventual perpetuity is an attribute which, in that stage of society at which laws have ceased to expire with the individual legislator, is understood to be inherent in all laws in which no expression is found to the contrary.

But if a particular length of time be marked out, during which, in the enactment of a law, it is declared that that law shall not be liable to suffer abrogation or alteration, the determination to tie up the hands of succeeding legislators is expressed in unequivocal terms.

Such, in respect of their constitutional code, was the pretension set up by the first assembly of legislators brought together by the French revolution.

A position not less absurd in principle, but, by the limitation in point of time, not pregnant with anything like equal mischief, was before that time acted upon, and still continues to be acted upon, in English legislation.

In various statutes, a clause may be found by which the statute is declared capable of being altered or repealed in the course of the same session. In this clause is contained, in the way of necessary implication, that a statute in which no such clause is inserted is not capable of being repealed or altered during the session, — no, not by the very hands by which it was made.

[a] To Ric. I. inclusive. [b] John, Ed. I. and II.

indirect legislation, and in particular those which have the quality of executing themselves, are the measures which, as they possess most efficiency when established, so they require greater ingenuity in the contrivance. Now, in proportion as laws execute themselves — in other words, are attended with voluntary obedience — in that proportion are they efficient; but it is only in proportion as they fail of being efficient, that to the man of law they are beneficial and productive; because it is only in proportion as they stand in need of enforcement, that business makes its way into the hands of the man of law.

CHAPTER V.

1. *Self-assumed Authority*—(*ad ignorantiam; ad verecundiam.*)

2. *The Self-trumpeter's fallacy.*

THIS fallacy presents itself in two shapes: — 1. An avowal made with a sort of mock modesty and caution by a person in exalted station, that he is incapable of forming a judgment on the question in debate, such incapacity being sometimes real, sometimes pretended; 2. Open assertion, by a person so situated, of the purity of his motives and integrity of his life, and the entire reliance which may consequently be reposed on all he says or does.

I. The first is commonly played off as follows: —An evil or defect in our institutions is pointed out clearly, and a remedy proposed, to which no objection can be made; up starts a man high in office, and, instead of stating any specific objection, says, "I am not prepared" to do so and so, "I am not prepared to say," &c. The meaning evidently intended to be conveyed is, "If I, who am so dignified, and supposed to be so capable of forming a judgment, avow myself incompetent to do so, what presumption, what folly, must there be in the conclusion formed by any one else!" In truth, this is nothing else but an indirect way of browbeating — arrogance under a thin veil of modesty.

If you are not prepared to pass a judgment, you are not prepared to condemn, and ought not, therefore, to oppose: the utmost you are warranted in doing, if sincere, is to ask for a little time for consideration.

Supposing the unpreparedness real, the reasonable and practical inference is — say nothing, take no part in the business.

A proposition for the reforming of this or that abuse in the administration of justice, is the common occasion for the employment of this fallacy.

In virtue of his office, every judge, every law-officer, is supposed and pronounced to be profoundly versed in the science of the law.

Yes; of the science of the law as it is, probably as much as any other man: but law as it ought to be, is a very different thing; and the proposal in question has for its avowed, and commonly for its real object, the bringing law as it is, somewhat nearer to law as it ought to be. But this is one of those things for which the great dignitary is sure to be at all times unprepared, — unprepared to join in any such design, everything of this sort, having been at all times contrary to his interest, — unprepared so much as to form any judgment concerning the conduciveness of the proposed measure to such its declared object: in any such point of view it has never been his interest to consider it.

A mind that, from its first entrance upon this subject, has been applying its whole force to the inquiry as to what are the most effectual means of making its profit of the imperfections of the system, — a mind to which, of consequence, the profit from these sources of affliction has been all along an object of complacency, and the affliction itself, at best, but an object of indifference, — a mind which has, throughout the whole course of its career, been receiving a correspondent bias, and has in consequence contracted a correspondent distortion, — cannot with reason be expected to exert itself with much alacrity or facility in a track so opposite and so new.

For the quiet of his conscience, if, at the outset of his career, it were his fortune to have one, he will naturally have been feeding himself with the notion, that if there be anything that is amiss, in practice it cannot be otherwise; which being granted, and, accordingly, that suffering to a certain amount cannot but take place, whatsoever profit can be extracted from it, is fair game, and as such belongs of right to the first occupant among persons duly qualified.

The wonder would not be great if an officer of the military profession should exhibit, for a time at least, some awkwardness if forced to act in the character of a surgeon's mate: to inflict wounds requires one sort of skill — to dress and heal them requires another. Telephus is the only man upon record who possessed an instrument by which wounds were with equal dispatch and efficiency made and healed. The race of Telephus is extinct; and as to his spears, if ever any of them found their way into Pompeii or Herculaneum, they remain still among the ruins.

Unfortunately, in this case, were the ability to form a judgment ever so complete, the likelihood of co-operation would not be increased. None are so completely deaf as those who will not hear — none are so completely unintelligent as those who will not understand.

Call upon a chief-justice to concur in a measure for giving possibility to the recovery of a debt,—the recovery of which is in his own

court rendered impossible by costs which partly go into his own pocket,—as well might you call upon the Pope to abjure the errors of the church of Rome. If not hard pressed, he will maintain a prudent and easy silence; if hard pressed, he will let fly a volley of fallacies — he will play off the argument drawn from the imputation of bad motives, and tell you of the profit expected by the party by whom the bill was framed, and petition procured, to form a ground for it. If that be not sufficient, he will transform himself in the first place into a witness giving evidence upon a committee; in the next place, after multiplying himself into the number of members necessary to hear and report upon that evidence, he will make a report accordingly.

He will report in that character, that when in any town a set of tradesmen have, on their petition, obtained a judicatory in which the recovery of a debt under 40s. or £5 is not attended with that obstruction of accumulated expense by which the relief which his judicatory professes to afford is always accompanied, it has been with no other effect than that of giving in the character of judges effect to claims which in the character of witnesses it was originally their design, and afterwards their practice, to give support to by perjury.

II. The second of these two devices may be called the self-trumpeter's fallacy.

By this name it is not intended to designate those occasional impulses of vanity which lead a man to display or overrate his pretensions to superior intelligence. Against the self-love of the man whose altar to himself is raised on this ground, rival altars, from every one of which he is sure of discouragement, raise themselves all around.

But there are certain men in office, who in discharge of their functions arrogate to themselves a degree of probity which is to exclude all imputations and all inquiry; their assertions are to be deemed equivalent to proof; their virtues are guarantees for the faithful discharge of their duties; and the most implicit confidence is to be reposed in them on all occasions. If you expose any abuse, propose any reform, call for securities, inquiry, or measures to promote publicity, they set up a cry of surprise, amounting almost to indignation, as if their integrity were questioned, or their honour wounded. With all this, they dexterously mix up intimations that the most exalted patriotism, honour, and perhaps religion, are the only sources of all their actions.

Such assertions must be classed among fallacies, because — 1. They are irrelevant to the subject in discussion; 2. The degree in which the predominance of motives of the social or disinterested cast is commonly asserted or insinuated, is, by the very nature of man, rendered impossible; 3. The sort of testimony thus given affords no legitimate reason for regarding the assertion in question to be true, for it is no less completely in the power of the most profligate than in that of the most virtuous of mankind; nor is it in a less degree the interest of the profligate man to make such assertions. Be they ever so completely false, not any the least danger of punishment does he see himself exposed to, at the hands either of the law or of public opinion.

For ascribing to any one of these self-trumpeters the smallest possible particle of that virtue which they are so loud in the profession of, there is no more rational cause, than for looking upon this or that actor as a good man, because he acts well the part of Othello, or bad, because he acts well the part of Iago.

4. On the contrary, the interest he has in trying what may be done by these means, is more decided and exclusive than in the case of the man of real probity and social feeling. The virtuous man, being what he is, has that chance for being looked upon as such; whereas the self-trumpeter in question, having no such ground of reliance, beholds his only chance in the conjunct effect of his own effrontery, and the imbecility of his hearers.

These assertions of authority, therefore, by men in office, who would have us estimate their conduct by their character, and not their character by their conduct, must be classed among political fallacies. If there be any one maxim in politics more certain than another, it is, that no possible degree of virtue in the governor can render it expedient for the governed to dispense with good laws and good institutions.*

CHAPTER VI.

LAUDATORY PERSONALITIES—(*ad amicitiam.*)

PERSONALITIES of this class are the opposites, and in some respects the counterparts, of vituperative personalities, which will be treated of next in order, at the commencement of the ensuing Book.

Laudatory personalities are susceptible of the same number of modifications as will be shown to exist in the case of vituperative personalities: but in this case the argument is so

* Madame de Staël says, that in a conversation which she had at Petersburgh with the Emperor of Russia, he expressed his desire to better the condition of the peasantry, who are still in a state of absolute slavery; upon which the female sentimentalist exclaimed, "Sire, your character is a constitution for your country, and your conscience is its guarantee." His reply was, "*Quand cela serait, je ne serais jamais* qu'un accident heureux." — *Dix années d'Exil*, p. 313.

much weaker than in the other, that the shades and modifications of it are seldom resorted to, and are therefore not worth a detailed exposition. The object of vituperative personalities is to effect the rejection of a measure, on account of the alleged bad character of those who promote it; and the argument advanced is — "The persons who propose or promote the measure, are bad; therefore the measure is bad, or ought to be rejected." The object of laudatory personalities is to effect the rejection of a measure on account of the alleged good character of those who oppose it; and the argument advanced is — "The measure is rendered unnecessary by the virtues of those who are in power; their opposition is a sufficient authority for the rejection of the measure."

The argument indeed is generally confined to persons of this description, and is little else than an extension of the self-trumpeter's fallacy. In both of them, authority derived from the virtues or talents of the persons lauded, is brought forward as superseding the necessity of all investigation.

"The measure proposed implies a distrust of the members of his Majesty's government; but so great is their integrity, so complete their disinterestedness, so uniformly do they prefer the public advantage to their own, that such a measure is altogether unnecessary: — their disapproval is sufficient to warrant an opposition: precautions can only be requisite where danger is apprehended; here, the high character of the individuals in question is a sufficient guarantee against any ground of alarm."

The panegyric goes on increasing in proportion to the dignity of the functionary thus panegyrized.

Subordinates in office are the very models of assiduity, attention, and fidelity to their trust; ministers, the perfection of probity and intelligence: and as for the highest magistrate in the state, no adulation is equal to describe the extent of his various merits.

There can be no difficulty in exposing the fallacy of the argument attempted to be deduced from these panegyrics: —

1. They have the common character of being irrelevant to the question under discussion. The measure must have something extraordinary in it, if a right judgment cannot be founded on its merits, without first estimating the character of the members of the government.

2. If the goodness of the measure be sufficiently established by direct arguments, the reception given to it by those who oppose it will form a better criterion for judging of their character, than their character (as inferred from the places which they occupy) for judging of the goodness or badness of the measure.

3. If this argument be good in any one case, it is equally good in every other; and the effect of it, if admitted, would be to give to the persons occupying for the time being the situation in question, an absolute and universal negative upon every measure not agreeable to their inclinations.

4. In every public trust, the legislator should, for the purpose of prevention, suppose the trustee disposed to break the trust in every imaginable way in which it would be possible for him to reap, from the breach of it, any personal advantage. This is the principle on which public institutions ought to be formed; and when it is applied to all men indiscriminately, it is injurious to none. The practical inference is, to oppose to such possible (and what will always be probable) breaches of trust every bar that can be opposed, consistently with the power requisite for the efficient and due discharge of the trust. Indeed, these arguments, drawn from the supposed virtues of men in power, are opposed to the first principles on which all laws proceed.

5. Such allegations of individual virtue are never supported by specific proof — are scarce ever susceptible of specific disproof; and specific disproof, if offered, could not be admitted, viz. in either House of Parliament. If attempted elsewhere, the punishment would fall, not on the unworthy trustee, but on him by whom the unworthiness had been proved.

PART II. FALLACIES OF DANGER,

THE SUBJECT-MATTER OF WHICH IS DANGER IN VARIOUS SHAPES, AND THE OBJECT TO REPRESS DISCUSSION ALTOGETHER, BY EXCITING ALARM.

CHAPTER I.

VITUPERATIVE PERSONALITIES — *(ad odium.)*

To this class belongs a cluster of fallacies so intimately connected with each other, that they may first be enumerated, and some observations be made upon them in the lump. By seeing their mutual relations to each other — by observing in what circumstances they agree, and in what they differ — a much more

correct as well as complete view will be obtained of them, than if they were considered each of them by itself.

The fallacies that belong to this cluster may be denominated —

1. Imputation of bad design.
2. Imputation of bad character.
3. Imputation of bad motive.
4. Imputation of inconsistency.
5. Imputation of suspicious connexions — *Noscitur ex sociis.*
6. Imputation founded on identity of denomination — *Noscitur ex cognominibus.*

Of the fallacies belonging to this class, the common character is the endeavour to draw aside attention from the *measure* to the *man*;* and this in such sort as, from the supposed imperfection on the part of the man by whom a measure is supported or opposed, to cause a correspondent imperfection to be imputed to the measure so supported, or excellence to the measure so opposed. The argument in its various shapes amounts to this: — In bringing forward or supporting the measure in question, the person in question entertains a bad design; therefore the measure is bad: — he is a person of a bad character; therefore the measure is bad: — he is actuated by a bad motive; therefore the measure is bad: — he has fallen into inconsistencies; on a former occasion, he either opposed it, or made some observation not reconcilable with some observation which he has advanced on the present occasion; therefore the measure is bad: — he is on a footing of intimacy with this or that person, who is a man of dangerous principles and designs, or has been seen more or less frequently in his company, or has professed, or is suspected of entertaining some opinion which the other has professed, or been suspected of entertaining; therefore the measure is bad: — he bears a name that at a former period was borne by a set of men now no more, by whom bad principles were entertained, or bad things done; therefore the measure is bad.

In these arguments, thus arranged, a sort of anti-climax may be observed; the fact intimated by each succeeding argument being suggested in the character of evidence of the one immediately preceding it, or at least of some one or more of those which precede it, and the conclusion being accordingly weaker and weaker at each step. The second is a sort of circumstantial evidence of the first, the third of the second, and so on. If the first is inconclusive, the rest fall at once to the ground.

Exposure. — Various are the considerations which concur in demonstrating the futility of the fallacies comprehended in this class, and (not to speak of the improbity of the utterers) the weakness of those with whom they obtain currency — the weakness of the acceptors: —

1. In the first place comes that general character of irrelevancy which belongs to these, in common with the several other articles that stand upon the list of fallacies.

2. In the next place comes the complete inconclusiveness. Whatsoever be their force as applied to a bad measure — to the worst measure that can be imagined, they would be found to apply with little less force to all good measures — to the best measures that can be imagined.

Among 658, or any such large number of persons taken at random, there will be persons of all characters: if the measure is a good one, will it become bad because it is supported by a bad man? If it is bad, will it become good because supported by a good man? If the measure be really inexpedient, why not at once show that it is so? Your producing these irrelevant and inconclusive arguments in lieu of direct ones, though not sufficient to prove that the measure you thus oppose is a good one, *contributes* to prove that you yourselves regard it as a good one.

After these general observations, let us examine, more in detail, the various shapes the fallacy assumes.

§ 1. *To begin with the imputation of bad design.*

The measure in question is not charged with being itself a bad one; for if it be, and in so far as it is thus charged, the argument is not irrelevant and fallacious. The bad design imputed, consists not in the design of carrying this measure, but some other measure, which is thus, by necessary implication, charged with being a bad one. Here, then,

* On the subject of personalities of the vituperative kind, the following are the instructions given by Gerard Hamilton: they contain all he says upon the subject. I. 31, 367, p. 67 — "It is an artifice to be used (but if used by others, to be detected,) to begin some personality, or to throw in something that may bring on a personal altercation, and draw off the attention of the House from the main point." II. 36 (470) p. 86 — "If your cause is too bad, call, in aid, the party" (meaning, probably, the *individual* who stands in the situation of party, not the assemblage of men of whom a political party is composed) — "if the party is bad, call, in aid, the cause: if neither is good, *wound the opponent.*" III., "If a person is powerful, he is to be made obnoxious; if helpless, contemptible; if wicked, detestable." In this we have, so far as concerns the head of personalities, "the whole fruit and result of the experience of one who was by no means unconversant with law," (says his editor, p. 6,) "and had himself sat in parliament for more than forty years; . . . . devoting almost all his leisure and thoughts, during the long period above mentioned, to the examination and discussion of all the principal questions agitated in parliament, and of the several topics and modes of reasoning by which they were either supported or opposed."

four things ought to be proved: viz. 1. That the design of bringing forward the supposed bad measure is really entertained; 2. That this design will be carried into effect; 3. That the measure will prove to be a bad one; 4. That but for the actually proposed measure, the supposed bad one would not be carried into effect.

This is, in effect, a modification of *the fallacy of distrust*, which will shortly be treated of.

But on what ground rests the supposition that the supposed bad measure will, as such a consequence, be carried into effect? The persons by whom, if at all, it will be carried into effect, will be either the legislators for the time being, or the legislators of some future contingent time. As to the legislators for the time being, observe the character and frame of mind which the orator imputes to these his judges: — "Give not your sanction to this measure; for though there may be no particular harm in it, yet if you do give your sanction to it, the same man by whom this is proposed, will propose to you others that will be bad; and such is your weakness, that, however bad they may be, you will want either the discernment necessary to enable you to see them in their true light, or the resolution to enable you to put a negative upon measures, of the mischief of which you are fully convinced." The imbecility of the persons thus addressed in the character of legislators and judges — their consequent unfitness for the situation, — such, it is manifest, is the basis of this fallacy. On the part of these legislators themselves, the forbearance manifested under such treatment on the part of the orator — the confidence entertained of his experiencing such forbearance — afford no inconsiderable presumption of the reality of the character so imputed to them.

§ 2. *Imputation of bad character.*

The inference meant to be drawn from an imputation of bad character, is either to cause the person in question to be considered as entertaining bad designs — *i. e.* about to be concerned in bringing forward future contingent and pernicious measures — or simply to destroy any persuasive force with which, in the character of authority, his opinion is likely to be attended.

In this last case, it is a fallacy opposed to a fallacy of the same complexion, played off on the other side: to employ it, is to combat the antagonist with his own weapons. In the former case, it is another modification of *the fallacy of distrust* — of which hereafter.

In proportion to the degree of efficiency with which a man suffers these instruments of deception to operate upon his mind, he enables bad men to exercise over him a sort of power, the thought of which ought to cover him with shame. Allow this argument the effect of a conclusive one, you put it into the power of any man to draw you at pleasure from the support of every measure which in your own eyes is good — to force you to give your support to any and every measure which in your own eyes is bad. Is it good? — the bad man embraces it, and by the supposition, you reject it. Is it bad? — he vituperates it, and that suffices for driving you into its embrace. You split upon the rocks, because he has avoided them — you miss the harbour, because he has steered into it.

Give yourself up to any such blind antipathy, you are no less in the power of your adversaries than by a correspondently irrational sympathy and obsequiousness you put yourself into the power of your friends.

§ 3. *Imputation of bad motive.*

The proposer of the measure, it is asserted, is actuated by bad motives, from whence it is inferred that he entertains some bad design. This, again, is no more than a modification of *the fallacy of distrust;* but one of the very weakest — 1. Because motives are hidden in the human breast; 2. Because, if the measure is beneficial, it would be absurd to reject it on account of the motives of its author. But what is peculiar to this particular fallacy, is the falsity of the supposition on which it is grounded; viz. the existence of a class or species of motives, to which any such epithet as bad, can with propriety be applied. What constitutes a motive, is the eventual expectation either of some pleasure or exemption from pain; but forasmuch as in itself there is nothing good but pleasure, or exemption from pain, it follows that no motive is bad in itself, though every kind of motive may, according to circumstances, occasion good or bad actions;* and motives of the dissocial cast may aggravate the mischief of a pernicious act. But if the act itself to which the motive gives birth — if in the proposed measure in question there be nothing pernicious, — it is not in the motive's being of the dissocial class — it is not in its being of the self-regarding class, — that there is any reason for calling it a bad one. Upon the influence and prevalence of motives of the self-regarding class, depends the preservation, not only of the species, but of each individual belonging to it. When, from the introduction of a measure, a man beholds the prospect of personal advantage in any shape whatever to himself, — say for example a pecuniary advantage, as being the most ordinary and palpable, or, dyslogistically speaking, the most gross, — it is certain that the contemplation of this advantage must have had some share in causing the conduct he pur-

* See *Introduction to the Principles of Morals and Legislation*, Vol. I.

sues: it may have been the only cause. The measure itself being by the supposition not pernicious, is it the worse for this advantage? On the contrary, it is so much the better. For of what stuff is public advantage composed, but of private and personal advantage?

§ 4. *Imputation of inconsistency.*

Admitting the fact of the inconsistency, the utmost it can amount to, in the character of an argument against the proposed measure, is, the affording a presumption of bad design in a certain way, or of bad character in a certain way and to a certain degree, on the part of the proposer or supporter of the measure. Of the futility of that argument, a view has been already given: and this, again, is a modification of *the fallacy of distrust.*

That inconsistency, when pushed to a certain degree, may afford but too conclusive evidence of a sort of relatively bad character, is not to be denied: if, for example, on a former occasion, personal interest inclining him one way (say against the measure,) arguments have been urged by the person in question against the measure; while on the present occasion, personal interest inclining him the opposite way, arguments are urged by him in favour of the measure, — or if a matter of fact, which on a former occasion was denied, be now asserted, or *vice versâ* — and in each case, if no notice of the inconsistency is taken by the person himself; — the operation of it to his prejudice will naturally be stronger than if an account more or less satisfactory is given by him of the circumstances and causes of the variance.

But, be the evidence with regard to the cause of the change what it may, no inference can be drawn from it against the measure, unless it be that such inconsistency, if established, may weaken the persuasive force of the opinion of the person in question in the character of authority: and in what respect and degree an argument of this complexion is irrelevant, has been already brought to view.

§ 5. *Imputation of suspicious connexions — (noscitur ex sociis.)*

The alleged badness of character on the part of the alleged associate being admitted, the argument now in question will stand upon the same footing as the four preceding; the weakness of which has been already exposed, and will constitute only another branch of *the fallacy of distrust.* But before it can stand on a par even with those weak ones, two ulterior points remain to be established: —

1. One is, the badness of character on the part of the alleged associate.

2. Another is, the existence of a social connexion between the person in question and his supposed associate.

3. A third is, that the influence exercised on the mind of the person in question is such, that in consequence of the connexion he will be induced to introduce and support measures (and those mischievous ones) which otherwise he would not have introduced or supported.

As to the two first of these three supposed facts, their respective degrees of probability will depend on the circumstances of each case. Of the third, the weakness may be exposed by considerations of a general nature. In private life, the force of the presumption in question is established by daily experience: but in the case of a political connexion, such as that which is created by an opposition to one and the same political measure or set of measures, the presumption loses a great part, sometimes the whole, of its force. Few are the political measures, on the occasion of which men of all characters, men of all degrees in the scale of probity and improbity, may not be seen on both sides.

The mere need of information respecting matters of fact, is a cause capable of bringing together, in a state of apparent connexion, some of the most opposite characters.

§ 6. *Imputation founded on identity of denomination — (noscitur ex cognominibus.)*

The circumstances by which this fallacy is distinguished from the last preceding is, that in this case, between the person in question, and the obnoxious persons by whose opinions and conduct he is supposed to be determined or influenced, neither personal intercourse nor possibility of personal intercourse can exist. In the last case, his measures were to be opposed because he was connected with persons of bad character, — in the present, because he bears the same denomination as persons now no more, but who in their own time were the authors of pernicious measures. In so far as a community of interest exists between the persons thus connected by community of denomination, the allegation of a certain community of designs is not altogether destitute of weight. Community of denomination, however, is but the sign, not the efficient cause, of community of interest. What have the Romans of the present day in common with the Romans of early times? Do they aspire to recover the empire of the world?

But when evil designs are imputed to men of the present day, on the ground that evil designs were entertained and prosecuted by their namesakes in time past, whatsoever may be the community of interest, one circumstance ought never to be out of mind: — this is, the gradual melioration of character from the most remote and barbarous, down to the present time; the consequence of which is, that in many particulars the same ends which were formerly pursued by persons of the same denomination are not now pursued; and if

in many others the same ends are pursued, they are not pursued by the same bad means. If this observation pass unheeded, the consequences may be no less mischievous than absurd: that which *has* been, is unalterable. If, then, this fallacy be suffered to influence the mind, and determine human conduct, whatsoever degree of depravity be imputed to preceding generations of the obnoxious denomination — whatsoever opposition may have been manifested towards them or their successors, — must continue without abatement to the end of time. "Be my friendship immortal, my enmity mortal," is the sentiment that has been so warmly and so justly applauded in the mouth of a sage of antiquity: but the fallacy here in question proposes to maintain its baneful influence for ever.

It is in matters touching religious persuasion, and to the prejudice of certain sects, that this fallacy has been played off with the greatest and most pernicious effect. In England, particularly against measures for the relief of the Catholics, "those of our ancestors, who, professing the same branch of the Christian religion as that which you now profess, were thence distinguished by the same name, entertained pernicious designs, that for some time showed themselves in pernicious measures; therefore you, entertaining the same pernicious designs, would now, had you but power enough, carry into effect the same pernicious measures: — they, having the power, destroyed by fire and faggot those who, in respect of religious opinions and ceremonies, differed from them; therefore, had you but power enough, so would you." Upon this ground, in one of the three kingdoms, a system of government continues, which does not so much as profess to have in view the welfare of the majority of the inhabitants, — a system of government in which the interest of the many is avowedly, so long as the government lasts, intended to be kept in a state of perpetual sacrifice to the interest of the few. In vain is it urged, these inferences, drawn from times and measures long since past, are completely belied by the universal experience of all present time. In the Saxon kingdom, in the Austrian empire, in the vast and ever-flourishing empire of France, though the sovereign is Catholic, whatsoever degree of security the government allows of, is possessed alike by Catholics and Protestants. In vain is it observed (not that to this purpose this or any other part of the history of the 17th century is worth observing) — in vain is it observed, and truly observed, the Church of England continued her fires after the Church of Rome had discontinued hers.*

* Under James I., when, for being Anabaptists or Arians, two men were burnt in Smithfield.

It is only in the absence of interest, that experience can hope to be regarded, or reason heard. In the character of sinecurists and over-paid placemen, it is the interest of the members of the English government to treat the majority of the people of Ireland on the double footing of enemies and subjects; and such is the treatment which is in store for them to the extent of their endurance.

§ 7. *Cause of the prevalence of the fallacies belonging to this class.*

Whatsoever be the nature of the several instruments of deception by which the mind is liable to be operated upon and deceived, the degree of prevalence they experience — the degree of success they enjoy, depends ultimately upon one common cause, viz. the ignorance and mental imbecility of those on whom they operate. In the present instance, besides this ultimate cause or root, they find in another fallacy, and the corresponding propensity of the human mind, a sort of intermediate cause. This is the fallacy of authority: the corresponding propensity is the propensity to save exertion by resting satisfied with authority. Derived from, and proportioned to, the ignorance and weakness of the minds to which political arguments are addressed, is the propensity to judge of the propriety or impropriety of a measure from the supposed character or disposition of its supporters or opposers, in preference to, or even in exclusion of, its own intrinsic character and tendency. Proportioned to the degree of importance attached to the character and disposition of the author or supporter of the measure, is the degree of persuasive force with which the fallacies belonging to this class will naturally act.

Besides, nothing but laborious application and a clear and comprehensive intellect, can enable a man on any given subject to employ successfully relevant arguments drawn from the subject itself. To employ personalities, neither labour nor intellect is required: in this sort of contest, the most idle and the most ignorant are quite on a par with, if not superior to, the most industrious and the most highly-gifted individuals. Nothing can be more convenient for those who would speak without the trouble of thinking: the same ideas are brought forward over and over again, and all that is required is to vary the turn of expression. Close and relevant arguments have very little hold on the passions, and serve rather to quell than to inflame them; while in personalities, there is always something stimulant, whether on the part of him who praises, or him who blames. Praise forms a kind of connexion between the party praising and the party praised, and vituperation gives an air of courage and independence to the party who blames.

Ignorance and indolence, friendship and enmity, concurring and conflicting interest, servility and independence — all conspire to give personalities the ascendency they so unhappily maintain. The more we lie under the influence of our own passions, the more we rely on others being affected in a similar degree. A man who can repel these injuries with dignity may often convert them into triumph: "Strike me, but hear," says he; and the fury of his antagonist redounds to his own discomfiture.

CHAPTER II.

§ 1. *The Hobgoblin Argument, or, No Innovation! — (ad metum.)*

Exposition.—The hobgoblin, the eventual appearance of which is denounced by this argument, is *anarchy;* which tremendous spectre has for its forerunner the monster *innovation.* The forms in which this monster may be denounced are as numerous and various as the sentences in which the word *innovation* can be placed.

"*Here it comes!*" exclaims the barbarous or unthinking servant in the hearing of the affrighted child, when, to rid herself of the burthen of attendance, such servant scruples not to employ an instrument of terror, the effects of which may continue during life. "*Here it comes!*" is the cry; and the hobgoblin is rendered but the more terrific by the suppression of its name.

Of a similar nature, and productive of similar effects, is the political device here exposed to view. As an instrument of deception, the device is generally accompanied by personalities of the vituperative kind: — imputation of bad motives, bad designs, bad conduct and character, &c. are ordinarily cast on the authors and advocates of the obnoxious measure; whilst the term employed is such as to beg the question in dispute. Thus, in the present instance, *innovation* means a *bad* change; presenting to the mind, besides the idea of a *change*, the proposition, either that change in general is a bad thing, or at least that the sort of change in question is a bad change.

Exposure.— All-comprehensiveness of the condemnation passed by this fallacy.

This is one of the many cases in which it is difficult to render the absurdity of the argument more glaring than it is upon the face of the argument itself.

Whatever reason it affords for looking upon the proposed measure, be it what it may, as about to be mischievous, it affords the same reason for entertaining the same opinion of everything that exists at present. To say all new things are bad, is as much as to say all things are bad — or, at any event, at their commencement: for of all the old things ever seen or heard of, there is not one that was not once new. Whatever is now *establishment*, was once *innovation.*

He who on this ground condemns a proposed measure, condemns, in the same breath, whatsoever he would be most averse to be thought to disapprove: — he condemns the Revolution, the Reformation, the assumption made by the House of Commons of a part in the penning of the laws in the reign of Henry VI., the institution of the House of Commons itself in the reign of Henry III.: — all these he bids us regard as sure forerunners of the monster anarchy, but particularly the birth and first efficient agency of the House of Commons — an innovation, in comparison of which all others, past or future, are for efficiency, and consequently mischievousness, but as grains of dust in the balance.

§ 2. *Apprehension of mischief from change — what foundation it has in truth.*

A circumstance that gives a sort of colour to the use of this fallacy is, that it can scarcely ever be found without a certain degree of truth adhering to it. Supposing the change to be one which cannot be effected without the interposition of the legislature, even this circumstance is sufficient to attach to it a certain quantity of mischief. The words necessary to commit the change even to writing, cannot be put into that form without labour, importing a proportional quantity of vexation to the head employed in it; which labour and vexation, if paid for, is compensated by and productive of expense. When disseminated by the operation of the press, as it always must be before it can be productive of whatever effect is aimed at, it becomes productive of ulterior vexation and expense. Here, then, is so much unavoidable mischief, of which the most salutary and indispensable change cannot fail to be productive: to this natural and unavoidable portion of mischief, the additions that have been made, in the shape of factitious and avoidable mischief of the same kind, are such as have sufficient claim to notice, but to a notice not proper for this place.

Here, then, we have the *minimum* of mischief which accompanies every change; and in this minimum of mischief we have the minimum of truth with which this fallacy is accompanied, and which is sufficient to protect it against exposure, from a flat and undiscriminating denial.

It is seldom, however, that the whole of the mischief, with the corresponding portion of truth, is confined within such narrow bounds.

Wheresoever any portion, however great or small, of the aggregate mass of the objects of desire in any shape — matter of wealth, power, dignity, or even reputation — and

whether in possession, or only in prospect, and that ever so remote and contingent — must, in consequence of the change, pass out of any hand or hands that are not willing to part with it, viz. either without compensation, or with no other than what, in their estimation, is insufficient; — here we have, in some shape or other, a quantity of vexation uncompensated — so much vexation, so much mischief beyond dispute.

But in one way or other, whether from the total omission of this or that item, or from the supposed inadequacy of the compensation given for it, or from its incapacity of being included in any estimate, as in case of remote and but weakly probable as well as contingent profits, it will not unfrequently happen that the compensation allotted in this case shall be inadequate, not only to the desires, but to the imagined rights of the party from whom the sacrifice is exacted. In so far as such insufficiency appears to himself to exist, he will feel himself urged by a motive, the force of which will be in proportion to the amount of such deficiency, to oppose the measure; and in so far as in his eyes such motive is fit to be displayed, it will constitute what in his language will be *reason*, and what will be received in that character by all other persons in whose estimate any such deficiency shall appear to exist. So far as any such deficiency is specifically alleged in the character of a reason, it forms a relevant and specific argument, and belongs not to the account of fallacies; and, if well founded, constitutes a just reason, if not for quashing the measure, at any rate for adding to the compensation thus shown to be deficient. And in this shape, viz. in that of a specific argument, will a man of course present his motive to view, if it be susceptible of it. But when the alleged damage and eventual injury will not, even in his own view of it, bear the test of inquiry, then, this specific argument failing him, he will betake himself to the general fallacy in lieu of it. He will set up the cry of *Innovation! Innovation!* hoping by this watchword to bring to his aid all whose sinister interest is connected with his own; and to engage them to say, and the unreflecting multitude to believe, that the change in question is of the number of those in which the mischief attached to it is not accompanied by a preponderant mass of advantage.

§ 3. *Time the innovator-general, a counter-fallacy.*

Among the stories current in the profession of the law, is that of an attorney, who, when his client applied to him for relief against a forged bond, advised him, as the shortest and surest course, to forge a release.

Thus, as a shorter and surer course than that of attempting to make men sensible of the imposture, this fallacy has been every now and then met by what may be termed its counter-fallacy: *Time itself is the arch-innovator.* The inference is, the proposed change, branded as it has thus been by the odious appellative of innovation, is in fact no change: its sole effect being either to prevent a change, or to bring the matter back to the good state in which it formerly was. This counter-fallacy, if such it may be termed, has not, however, any such pernicious properties or consequences attached to it as may be seen to be indicated by that name. Two circumstances, however, concur in giving it a just title to the appellation of a fallacy: one is, that it has no specific application to the particular measure in hand, and on that score may be set down as irrelevant; the other, that by a sort of implied concession and virtual admission, it gives colour and countenance to the fallacy to which it is opposed, — admitting by implication, that if the appellation of a change belonged with propriety to the proposed measure, it might on that single account with propriety be opposed.

A few words, then, are now sufficient to strip the mask from this fallacy. No specific mischief, as likely to result from the specific measure, is alleged; if it were, the argument would not belong to this head. What is alleged, is nothing more than that mischief, without regard to the amount, would be among the results of this measure. But this is no more than can be said of every legislative measure that ever did pass, or ever can pass. If, then, it be to be ranked with arguments, it is an argument that involves in one common condemnation all political measures whatsoever, past, present, and to come; it passes condemnation on whatsoever, in this way, ever has been, or ever can be done, in all places as well as in all times. Delivered from an humble station, from the mouth of an old woman beguiling by her gossip the labours of the spinning-wheel in her cottage, it might pass for simple and ordinary ignorance: — delivered from any such exalted station as that of a legislative house or judicial bench, — from such a quarter, if it can be regarded as sincere, it is a mark of *drivelling* rather than ignorance.

But it may be said — "My meaning is not to condemn all change — not to condemn all new institutions, all new laws, all new measures, — only violent and dangerous ones, such as that is which is now proposed." The answer is: Neither drawing or attempting to draw any line, you do by this indiscriminating appellative pass condemnation on all change — on everything to which any such epithet as *new* can with propriety be applied. Draw any such line, and the reproach of insincerity or imbecility shall be withholden: draw your line; but remember, that whenever

you do draw it, or so much as begin to draw it, you give up this your argument.

Alive to possible-imaginable evils, dead to actual ones — eagle-eyed to future contingent evils, blind and insensible to all existing ones, — such is the character of the mind, to which a fallacy such as this can really have presented itself in the character of an argument possessing any the smallest claim to notice. To such a mind, — that by denial and sale of justice, anarchy, in so far as concerns nine-tenths of the people, is actually by force of law established, and that it is only by the force of morality — of such morality as all the punishments denounced against sincerity, and all the reward applied for the encouragement of insincerity, have not been able to banish, — that society is kept together; — that to draw into question the fitness of great characters for their high situations, is in one man a crime, while to question their fitness, so that their motives remain unquestioned, is lawful to another; — that the crime called *libel* remains undefined and undistinguishable, and the liberty of the press is defined to be the absence of that security which would be afforded to writers by the establishment of a licenser; — that under a show of limitation, a government shall be in fact an absolute one, while pretended guardians are real accomplices, and at the nod of a king or a minister, by a regular trained body of votes, black shall be declared white — miscarriage, success — mortality, health — disgrace, honour — and notorious experienced imbecility, consummate skill; — to such a mind, these, with other evils boundless in extent and number, are either not seen to be in existence, or not felt to be such. In such a mind, the horror of innovation is as really a disease as any to which the body in which it is seated is exposed. And in proportion as a man is afflicted with it, he is the enemy of all good, which, how urgent soever may be the demand for it, remains as yet to be done; nor can he be said to be completely cured of it, till he shall have learnt to take, on each occasion, and without repugnance, general utility for the general end, and to judge of whatever is proposed, in the character of a means conducive to that end.

§ 4. *Sinister interests in which this fallacy has its source.*

Could the wand of that magician be borrowed, at whose potent touch the emissaries of his wicked antagonist threw off their several disguises, and made instant confession of their real character and designs, — could a few of those ravens by whom the word *innovation* is uttered with a scream of horror, and the approach of the monster *anarchy* denounced, — be touched with it, we should then learn their real character and have the true import of these screams translated into intelligible language.

1. I am a lawyer (would one of them be heard to say,) — a fee-fed judge — who, considering that the money I lay up, the power I exercise, and the respect and reputation I enjoy, depend on the undiminished continuance of the abuses of the law, the factitious delay, vexation, and expense with which the few who have money enough to pay for a chance of justice are loaded, and by which the many who have not, are cut off from that chance, — take this method of deterring men from attempting to alleviate those torments in which my comforts have their source.

2. I am a sinecurist (cries another,) who being in the receipt of £38,000 a-year, public money, for doing nothing, and having no more wit than honesty, have never been able to open my mouth and pronounce any articulate sound for any other purpose, — yet, hearing a cry of "No sinecures!" am come to join in the shout of "No innovation! down with the innovators!" in hopes of drowning, by these defensive sounds, the offensive ones which chill my blood and make me tremble.

3. I am a contractor (cries a third,) who having bought my seat that I may sell my votes — and in return for them, being in the habit of obtaining with the most convenient regularity a succession of good jobs, foresee, in the prevalence of innovation, the destruction and the ruin of this established branch of trade.

4. I am a country gentleman (cries a fourth,) who observing that from having a seat in a certain assembly a man enjoys more respect than he did before, on the turf, in the dog-kennel, and in the stable, and having tenants and other dependents enough to seat me against their wills for a place in which I am detested, and hearing it said that if innovation were suffered to run on unopposed, elections would come in time to be as free in reality as they are in appearance and pretence, — have left for a day or two the cry of "Tally-ho!" and "Hark forward!" to join in the cry of "No Anarchy!" "No innovation!"

5. I am a priest (says a fifth,) who having proved the pope to be antichrist to the satisfaction of all orthodox divines whose piety prays for the cure of souls, or whose health has need of exoneration from the burthen of residence; and having read, in my edition of the Gospel, that the apostles lived in palaces, which innovation and anarchy would cut down to parsonage-houses; though grown hoarse by screaming out, "No reading!" "No writing!" "No Lancaster!" and "No popery!" — for fear of coming change, am here to add what remains of my voice to the full chorus of "No Anarchy!" "No Innovation!"

CHAPTER III.

FALLACY OF DISTRUST, OR, WHAT'S AT THE BOTTOM? — (*ad metum.*)

Exposition. — This argument may be considered as a particular modification of the *No-Innovation* argument. An arrangement or set of arrangements has been proposed, so plainly beneficial, and at the same time so manifestly innoxious, that no prospect presents itself of bringing to bear upon them with any effect the cry of No innovation. Is the anti-innovationist mute? No; he has this resource: — In what you see as yet (says he) there may perhaps be no great mischief; but depend upon it, in the quarter from whence these proposed innoxious arrangements come, there are *more behind* that are of a very different complexion; if these innoxious ones are suffered to be carried, others of a noxious character will succeed without end, and will be carried likewise.

Exposure. — The absurdity of this argument is too glaring to be susceptible of any considerable illustration from anything that can be said of it: —

1. In the first place, it begins with a virtual admission of the propriety of the measure considered in itself; and thus containing within itself a demonstration of its own futility, it cuts up from under it the very ground which it is endeavouring to make: yet, from its very weakness, it is apt to derive for the moment a certain degree of force. By the monstrosity of its weakness, a feeling of surprise, and thereupon of perplexity, is apt to be produced: and so long as this feeling continues, a difficulty of finding an appropriate answer continues with it. For that which is itself nothing, what answer (says a man) can I find?

If two measures — G and B — were both brought forward at the same time, G being good and B bad; — rejecting G, because B is bad, would be quite absurd enough; and at first view a man might be apt to suppose that the force of absurdity could go no further.

But the present fallacy does in effect go much further: — two measures, both of them brought upon the carpet together, both of them unobjectionable, are to be rejected, not for anything that is amiss in either of them, but for something that by possibility may be found amiss in some other or others that nobody knows of, and the future existence of which, without the slightest ground, is to be assumed and taken for granted.

In the field of policy as applied to measures, this vicarious reprobation forms a counterpart to vicarious punishment in the field of justice as applied to persons.

The measure G, which is good, is to be thrown out, because, for aught we can be sure of, some day or other it may happen to be followed by some other measure B, which may be a bad one. A man A, against whom there is neither evidence nor charge, is to be punished, because, for aught we can be sure of, some time or other there may be some other man who will have been guilty.

If on this ground it be right that the measure in question be rejected, so ought every other measure that ever has been or can be proposed: for of no measure can anybody be sure but that it may be followed by some other measure or measures, of which, when they make their appearance, it may be said that they are bad.

If, then, the argument proves anything, it proves that no measure ought ever to be carried, or ever to have been carried; and that, therefore, all things that can be done by law or government, and therefore law and government themselves, are nuisances.

This policy is exactly that which was attributed to Herod in the extermination of the innocents; and the sort of man by whom an argument of this sort can be employed, is the sort of man who would have acted as Herod did, had he been in Herod's place.

But think, not only what sort of man he must be who can bring himself to employ such an argument; but moreover, what sort of men they must be to whom he can venture to propose it — on whom he can expect it to make any impression, but such a one as will be disgraceful to himself. "Such drivellers," says he to them in effect, "such drivellers are you, so sure of being imposed upon by any one that will attempt it, that you know not the distinction between good and bad; and when, at the suggestion of this or that man, you have adopted any one measure, good or bad, let but that same man propose any number of other measures, whatever be their character, ye are such idiots and fools, that without looking at them yourselves, or vouchsafing to learn their character from others, you will adopt them in a lump." Such is the compliment wrapt up in this sort of argument.

CHAPTER IV.

OFFICIAL MALEFACTOR'S SCREEN — (*ad metum.*)

"Attack us, you attack Government."

Exposition. — The fallacy here in question is employed almost as often as, in speaking of the persons by whom, or of the system on which, the business of the government is conducted, any expressions importing condemnation or censure are uttered. The fallacy consists in affecting to consider such condemnation or censure as being, if not in design,

at least in tendency, pregnant with mischief to government itself: — "Oppose us, you oppose government;" "Disgrace us, you disgrace government;" "Bring us into contempt, you bring government into contempt; and anarchy and civil war are the immediate consequences." Such are the forms it assumes.

Exposure. — Not ill-grounded, most assuredly, is the alleged importance of this maxim: to the class of persons by or for whom it is employed, it must be admitted to be well worth whatsoever pains can be employed in decking it out to the best advantage.

Let but this notion be acceded to, all persons now partaking, or who may at any time be likely to partake, in the business and profit of misrule, must, in every one of its shapes, be allowed to continue so to do without disturbance: all abuses, as well future as present, must continue without remedy. The most industrious labourers in the service of mankind will experience the treatment due to those to whose dis-social or selfish nature the happiness of man is an object of aversion or indifference. Punishment, or at least disgrace, will be the reward of the most exalted virtue; perpetual honour, as well as power, the reward of the most pernicious vices. Punishment will be, and so by English libel-law it is at this day — let but the criminal be of a certain rank in the state, and the mischief of the crime upon a scale to a certain degree extensive — punishment will be, not for him who commits a crime, but for him who complains of it.

So long as the conduct of the business of the government contains anything amiss in it — so long as it contains in it anything that could be made better — so long, in a word, as it continues short of a state of absolute perfection, — there will be no other mode of bringing it nearer to perfection — no other means of clearing it of the most mischievous abuses with which government can be defiled, than the indication of such points of imperfection as at the time being exist, or are supposed to exist in it; which points of imperfection will always be referable to one or other of two heads: the conduct of this or that one of the individuals by whom in such or such a department the business of government is conducted; or the state of the system of administration under which they act. But neither in the system in question, nor in the conduct of the persons in question, can any imperfection be pointed out, but that, as towards such persons or such system, in proportion to the apparent importance and extent of that imperfection, aversion or contempt must in a greater or less degree be produced.

In effect, this fallacy is but a mode of intimating in other words, that no abuse ought to be reformed — that nothing ought to be uttered in relation to the misconduct of any person in office, which may produce any sentiment of disapprobation.

In this country at least, few if any persons aim at any such object as the bringing into contempt any of those offices on the execution of which the maintenance of the general security depends; — any such office, for example, as that of king, member of parliament, or judge. As to the person of the king, if the maxim, "The king can do no wrong," be admitted in both its senses, there can be no need of imputing blame to him, unless in the way of defence against the imprudence or the improbity of those who, by groundless or exaggerated eulogiums on the personal character of the individual monarch on the throne, seek to extend his power, and to screen from censure or scrutiny the misconduct of his agents.

But in the instance of any other office, to reprobate everything the tendency of which is to expose the officer to hatred or contempt, is to reprobate everything that can be said or done, either in the way of complaint against past, or for the purpose of preventing future transgressions; — to reprobate everything the tendency of which is to expose the office to hatred or contempt, is to reprobate everything that can be said or done towards pointing out the demand for reform, how needful soever, in the constitution of the office.

If in the constitution of the office, in respect of mode of appointment, mode of remuneration, &c., there be anything that tends to give all persons placed in it an interest acting in opposition to official duty, or to give an increased facility to the effective pursuit of any such sinister interest, everything that tends to bring to view such sinister interest, or such facility, contributes, it may be said, to bring the office itself into contempt.

That under the existing system of judicature, so far as concerns its higher seats, the interest of the judge is, throughout the whole field of his jurisdiction, in a state of constant and diametrical opposition to the line of his duty; — that it is his interest to maintain undiminished, and as far as possible to increase, every evil opposite to the ends of justice, viz. uncertainty, delay, vexation and expense; — that the giving birth to these evils has at all times been more or less an object with every judge (the present ones excepted, of whom we say nothing) that ever sat on a Westminster-Hall bench; — and that, under the present constitution of the office, it were weakness to expect at the hands of a judge anything better; — whilst, that of the above-mentioned evils, the load which is actually endured by the people of this country, is, as to a very small part only, the natural and un-

avoidable lot of human nature; — are propositions which have already in this work been made plain to demonstration, and in the belief of which the writer has been confirmed by the observations of nearly sixty years — propositions, of the truth of which he is no more able to entertain a doubt, than he is of his own existence.

But in these sentiments, has he any such wish as to see enfeebled and exposed to effectual resistance the authority of judges? — of any established judicatory? — of any one occupier of any such judicial seat? No: the most strenuous defender of abuse in every shape would not go further than he in wishes, and upon occasion in exertion, for its support.

For preventing, remedying, or checking transgression on the part of the members of government, or preventing their management of the business of government from becoming completely arbitrary, the nature of things affords no other means than such, the tendency of which, as far as they go, is to lower either these managing hands, or the system, or both, in the affection and estimation of the people: which effect, when produced in a high degree, may be termed bringing them into hatred and contempt.

But so far is it from being true that a man's aversion or contempt for the hands by which the powers of government, or even for the system under which they are exercised, is a proof of his aversion or contempt towards government itself, that, even in proportion to the strength of that aversion or contempt, it is a proof of the opposite affection. What, in consequence of such contempt or aversion, he wishes for, is, not that there be no hands at all to exercise these powers, but that the hands may be better regulated; — not that those powers should not be exercised at all, but that they should be better exercised; — not that, in the exercise of them, no rules at all should be pursued, but that the rules by which they are exercised should be a better set of rules.

All government is a trust — every branch of government is a trust, and immemorially acknowledged so to be: it is only by the magnitude of the scale, that public differ from private trusts.

I complain of the conduct of a person in the character of guardian — as domestic guardian, having the care of a minor or insane person. In so doing, do I say that guardianship is a bad institution? Does it enter into the head of any one to suspect me of so doing?

I complain of an individual in the character of a commercial agent, or assignee of the effects of an insolvent. In so doing, do I say that commercial agency is a bad thing? — that the practice of vesting in the hands of trustees or assignees the effects of an insolvent, for the purpose of their being divided among his creditors, is a bad practice? Does any such conceit ever enter into the head of man, as that of suspecting me of so doing?

I complain of an imperfection in the state of the law relative to guardianship. In stating this supposed imperfection in the state of the law itself, do I say that there ought to be no law on the subject? — that no human being ought to have any such power as that of guardian over the person of any other? Does it ever enter into the head of any human being to suspect me so much as of entertaining any such persuasion, not to speak of endeavouring to cause others to entertain it?

Nothing can be more groundless than to suppose that the disposition to pay obedience to the laws by which security in respect of person, property, reputation, and condition in life, is afforded, is influenced by any such consideration as that of the fitness of the several functionaries for their respective trusts, or even so much as by the fitness of the system of regulations and customs under which they act.

The chief occasions in which obedience on the part of a member of the community, in his character of subject, is called upon to manifest itself, are the habitual payment of taxes, and submission to the orders of courts of justice: the one an habitual practice, the other an occasional and eventual one. But in neither instance in the disposition to obedience, is any variation produced by any increase or diminution in the good or ill opinion entertained in relation to the official persons by whom the business of those departments is respectively carried on, or even in relation to the goodness of the systems under which they act.

Were the business of government carried on ever so much worse than it is, still it is from the power of government in its several branches, that each man receives whatsoever protection he enjoys, either against foreign or domestic adversaries. It is therefore by his regard for his own security, and not by his respect either for the persons by whom, or the system according to which, those powers are exercised, that his wish to see obedience paid to them by others, and his disposition to pay obedience to them himself, are produced.

Were it even his wish to withhold from them his own obedience, that wish cannot but be altogether ineffectual, unless and until he shall see others in sufficient number disposed and prepared to withhold each of them his own obedience — a state of things which can only arise from a common sense of overwhelming misery, and not from the mere utterance of complaint. There is no freedom of the press, no power to complain, in Turkey; yet of all countries it is that in which revolts and revolutions are the most frequent and the most violent.

Here and there a man of strong appetites,

weak understanding and stout heart excepted, it might be affirmed with confidence that the most indigent and most ignorant would not be foolish enough to wish to see a complete dissolution of the bonds of government. In such a state of things, whatsoever he might expect to grasp for the moment, he would have no assured hope of keeping. Were he ever so strong, his strength, he could not but see, would avail him nothing against a momentarily confederated multitude; nor in one part of his field, against a swifter individual ravaging the opposite part; nor during sleep, against the weakest and most sluggish: and for the purpose of securing himself against such continually-impending disasters, let him suppose himself entered into an association with others-for mutual security, — he would then suppose himself living again under a sort of government.

Even the comparatively few who, for a source of subsistence, prefer depredation to honest industry, are not less dependent for their wretched and ever palpitating existence than the honest and industrious are for theirs, on that general security to which their practice creates exceptions. Be the momentary object of his rapacity what it may, what no one of them could avoid having a more or less distinct conception of, is, that it could not exist for him further than it is secured against others.

So far is it from being true, that no government can exist consistently with such exposure, no good government can exist without it.

Unless by open and lawless violence, by no other means than lowering in the estimation of the people the hands by which the powers of government are exercised, if the cause of the mischief consist in the unfitness of the hands — or the system of management under which they act, if the cause of the mischief lie in the system — be the hands ever so unfit, or the system ever so ill-constructed, — can there be any hope or chance of beneficial change.

There being no sufficient reason for ascribing even to the worst-disposed any wish so foolish as that of seeing the bonds of government dissolved, nor on the part of the best-disposed any possibility of contributing to produce change, either in any ruling hands deemed by them unfit for their trust, or of the system deemed by them ill adapted to those which are or ought to be its ends, otherwise than by respectively bringing into general disesteem these objects of their disapprobation, — there cannot be a more unfounded imputation, or viler artifice if it be artifice, or grosser error if it be error, than that which infers from the disposition, or even the endeavour to lessen in the estimation of the people the existing rulers, or the existing system, any such wish as that of seeing the bands of government dissolved.

In producing a local or temporary debility in the action of the powers of the natural body, in many cases, the honest and skilful physician beholds the only means of cure: and from the act of the physician who prescribes an evacuant or a sedative, it would be as reasonable to infer a wish to see the patient perish, as from the act of a statesman, whose endeavours are employed in lowering the reputation of the official hands in whom, or the system of management in which, he beholds the cause of what appears to him amiss, — to infer a wish to see the whole frame of government either destroyed or rendered worse.

In so far as a man's feeling and conduct are influenced and determined by what is called *public opinion*, by the force of the *popular* or *moral sanction*, and that opinion runs in conformity with the dictates of the principles of general utility, — in proportion to the value set upon reputation, and the degree of respect entertained for the community at large, his conduct will be the *better*, the more completely the quantity of respect he enjoys is dependent upon the goodness of his behaviour: it will be the *worse*, the more completely the quantity of respect he is sure of enjoying is independent of it.

Thus, whatsoever portion of respect the people at large are in the habit of bestowing upon the individual by whom, on any given occasion, the office in question is filled, this portion of respect may, so long as the habit continues, be said to be attached to the office, just as any portion of the emolument is, which happens to be attached to the office.

But as it is with emolument, so is it with respect. The greater the quantity of it a man is likely to receive independently of his good behaviour, the less good, in so far as depends upon the degree of influence with which the love of reputation acts upon his mind, is his behaviour likely to be.

If this be true, it is in so far the interest of the public, that that portion of respect, which along with the salary is habitually attached to the office, should be as small as possible.

If, indeed, the notion which it is the object of the fallacy in question to inculcate were true, viz. that the stability of the government, or its existence at each given point of time, depends upon the degree of respect bestowed upon the several individuals by whom at that point of time its powers are exercised, — if this were true, it would not be the interest of the public that the portion of respect habitually attached to the office, and received by the official person independently of his good behaviour in it, should be as small as possible. But in how great a degree this notion is erroneous, has been shown already

But while it is the interest of the public, that in the instance of each trustee of the public, the remuneration received by him in the shape of respect should be as completely dependent as possible upon the goodness of his behaviour in the execution of his trust, it is the interest of the trustee himself that, as in every other shape, so in the shape of respect, whatsoever portion of the good things of this world he receives, on whatever score, whether on the score of remuneration or any other, should be as great as possible; since by good behaviour, neither respect nor anything else can be always earned by him but by sacrifices in some shape or other, and in particular in the shape of ease.

Whatsoever, therefore, be the official situation which the official person in question occupies, it is his interest that the quantity of respect habitually attached to it be as great, and at the same time as securely attached to it, as possible.

And in the point of view from which he is by his personal and sinister interest led to consider the subject, the point of perfection in this line will not be attained until the quantity of respect he receives, in consequence of the possession he has of the office, be at all times as great as the nature of the office admits — at all times as completely independent of the goodness of his behaviour in his office as possible — as great, in the event of his making the worst and least good use, as in that of his making the best and the least bad use, of the powers belonging to it.

Such being his interest, whatsoever be his official situation, if, as is the case of most, if not all official situations, it be of such a nature as to have power in any shape attached to it, his endeavour and study will be so to order matters as to cause to be attached to it as above, and by all means possible, the greatest portion of respect possible.

To this purpose, amongst others, will be directed whatsoever influence his will can be made to act with on other wills, and whatsoever influence his understanding can be made to exert over other understandings.

If, for example, his situation be that of a judge, — by the influence of will on will, it will seldom in any considerable degree be in his power to compel men by force to bestow upon him the sentiment of respect, either by itself, or in any considerable degree by means of any external mark or token of it: but he may restrain men from saying or doing any of those things, the effect of which would be to cause others to bestow upon him less respect than they would otherwise.

If, being a judge of the King's Bench, any man has the presumption to question his fitness for such his high situation, he may for so doing punish him by fine and imprisonment with *et cæteras*. If a Lord Chancellor, he may prosecute him before a judge, by whom a disposition to attach such punishments to such offences has been demonstrated by practice.

Thus much as to what can, and what cannot be done, towards attaching respect to office, by the influence of will on will.

What may be done by the influence of understanding on understanding, remains to be noticed. Laying out of the question that influence which, in the official situation in question, is exercised over the understandings of the people at large, independently of any exertions on the part of him by whom it is filled, — that which on his part requires exertion, and is capable of being exercised by exertion, consists in the giving utterance and circulation in the most impressive manner to the fallacy in question, together with a few such others as are more particularly connected with it.

Upon the boldness and readiness with which the hands and system are spoken ill of, depends the difference between arbitrary and limited government — between a government in which the great body of the people have, and one in which they have not, a share.

In respect of the members of the governing body, undoubtedly the state of things most to be desired is, that the only occasion on which any endeavours should be employed to lower them in the estimation of the public should be those in which inaptitude in some shape or other, want of probity, or weakness of judgment, or want of appropriate talent, have justly been imputable to them: that on those occasions in which inaptitude has not in any of those shapes been justly imputable, no such endeavour should ever be employed.

Unfortunately, the state of things hereby supposed is plainly (need it be said?) an impossible one. Admit no accusation, you may, and you will exclude all unjust ones: admit just ones, you must admit unjust ones along with them; there is no help for it. One of two evils being necessary to be chosen, the question is, which is the least? — to admit all such imputations, and thereby to admit of unjust ones? or to exclude all such imputations, and thereby to exclude all just ones? I answer without difficulty, — the admission of unjust imputations is, beyond comparison, the least of the two evils. Exclude all unjust imputations, and with them all just ones, — the only check by which the career of deterioration can be stopped being thus removed, both *hands* and *system* will, until they arrive at the extreme of despotism and misrule, be continually growing worse and worse: the hands themselves will grow worse and worse, having nothing to counteract the force of that separate and sinister interest to the action of which they remain constantly exposed; and the system itself will grow worse and worse,

it being all along, the interest, and, by the supposition, within the power, of the hands themselves to make it so.

Admit just imputations, though along with them you admit unjust ones, — so slight is the evil as scarcely to bear that name. Along with unjust imputations, are not defences admitted? In respect of motives and of means, have not the defendants in this case, beyond all comparison, the advantage of the complainants?

As far as concerns *motives*, in the instance of every person included in the attack (and in an attack made upon any one member of the government as such, who does not know how apt all are to feel themselves included?) the principle of self-preservation is stronger than the exciting cause productive of the disposition to attack can be in any instance.

As far as concerns *means* of defence, if the person against whom the attack is principally levelled wants time or talent to defend himself, scarce a particle of the immense mass of the matter of reward, — which, in all manner of shapes, for the purpose of carrying on the ordinary business of government, lies constantly at the disposal of the members of the government,—but is applicable, even without any separate expense, to the extraordinary purpose of engaging defending advocates.

Let it not be said — "This is a persecution to which an honourable man ought not to be exposed — a persecution which, though to some honourable men it may be tolerable, will to others be intolerable — intolerable to such a degree as to deprive the public of the benefit of their services."

A notion to any such effect will scarcely be advanced with a grave face. That censure is the tax imposed by nature upon eminence, is the A B C of common place. Who is there to whom it can be a doubt that exposure to such imputations is among the inevitable appendages of office? If it were an office which in no shape whatever had any adequate allowance of the matter of reward annexed to it — if it were a situation into which men were pressed — the observation would have some better ground; but in the class of office here in question, exists there any such?

A self-contradiction is involved in the observation itself. The subject, of which sensibility thus morbid is predicated, is *an honourable man:* but to an honourable man, to any man to whom the attribute honourable can with truth and justice be applied, such sensibility cannot be attributed. The man who will not accept an office but upon condition that his conduct in it shall remain exempt from all imputation, intends not that his conduct shall be what it ought to be; — the man to whom the idea of being subject to those imputations, to which he sees the best are exposed, is intolerable, — is in his heart a tyrant — and, to become so in practice, wants nothing but to be seated on one of those thrones, or on one of those benches, in which, by the appearance of chains made for show and not for use, a man is enabled, with the greater dignity as well as safety, to act the part of the tyrant, and glut himself with vengeance.

To a man who, in the civil line of office, accepts a commission, it is not less evident that by so doing he exposes himself to imputations, some of which may happen to be unjust, than to a man in the military line it is evident, that by acceptance of a commission in that line he exposes himself to be shot at: and of a military office, with about equal truth might it be said, that an honourable man will not accept it on such condition, as of a civil office, that an honourable man will not accept it if his conduct is to stand exposed to such imputations.

In such circumstances, it is not easy to see how it should happen to a public man to labour at the long-run under an imputation that is not just. In so far as any such incident does take place, evil does in truth take place: but even in this case, the evil will not be unaccompanied with concomitant good, operating in compensation for it. On the part of men in office, it contributes to keep up the habit of considering their conduct as exposed to scrutiny — to keep up in their minds that sense of responsibility on which goodness of conduct depends, in which good behaviour finds its chief security.

On the part of the people at large, it serves to keep alive the expectation of witnessing such attacks, — the habit of looking out for them; and, when any such attack does come, it prevents the idea of hardship which is apt to attach upon any infliction, how necessary soever, of which it can be said that it is unprecedented or even rare; and hinders the public mind from being set against the attack, and him who finds exertion and courage enough to make it.

When, in support of such imputations, false facts are alleged, the act of him by whom such false allegations are made, not only ought to be regarded as pernicious, but ought to be, and is, consistently with justice and utility, punishable — punishable even when advanced through temerity, without consciousness of the falsity, and more so when accompanied with such dishonest consciousness.

But by a sort of law, of which the protection of high-seated official delinquency is at least the effect, not to say the object, a distinction thus obvious as well as important has been carefully overlooked: and whenever, to the prejudice of the reputation of a man, especially if he be a man in office, a fact which has with more or less confidence been asserted or insinuated, turns out to be false,

the existence of dishonest consciousness, whether really existing or not, is assumed.

In so far as public men, trustees and agents for the people in possession or expectancy, are the objects, a general propensity to scrutinize into their conduct, and thereby to cast imputations on it at the hazard of their being more or less unmerited, is a useful propensity — it is conducive to good behaviour on their part: and for the opposite and corresponding reason, the habit of general laudation — laudation without specific grounds — is a mischievous propensity, being conducive to ill behaviour on their part.

Render all such endeavours hopeless, you take from a bad state of things all chance of being better: allow to all such endeavours the freest range, you do no injury to the best state of things imaginable.

Whatsoever facilities the adversaries of the existing state of things have for lowering it in the estimation of the people, equal facilities at least, if not greater, have its friends and supporters for keeping and raising it up.

Under the English constitution, at any rate, the most strenuous defenders of the existing set of managing hands, as well as of the existing system of management, are not backward in representing an opposition as being no less necessary a power among the springs of government than the regulator in a watch.* But in what way is it that opposition, be it what it may, ever acts, or ever can act, but by endeavouring to lower either the managing hands, or, in this or that part of it, the system of management, in the estimation of the people? And from a watchmaker's putting a regulating spring into the watch he is making, it would be just as reasonable and fair to infer that his meaning is to destroy the watch, as from the circumstance of a man seeking, in this or that instance, to lower in the estimation of the people the managing hands, or this or that part of the system of management, to infer a desire on his part to destroy the government.

Under the English constitution at least, not only in point of fact, is the disposition to pay that obedience by which the power of government is constituted, and on which the existence of it depends, independent of all esteem for the hands by which this power is exercised, unaffected by any dis-esteem for this or that part of the system of management according to which it is executed; but, under such a constitution at least, the more complete this independence, the better for the stability and prosperity of the state. Being as it is, it suffices for carrying on at all times the business of government; viz. upon that footing in point of skill and prosperity which is consistent with the aptitude, probity, and intelligence of the managing hands, and the goodness of the system of management under which they act: but if on each occasion it depended on the degree of estimation in which the conduct and character of the managing hands, and the structure of the system of management under which they act, happened at that time to be held by the majority of the people, this power would be seen strong, and perhaps too strong, at one time; weak to any degree of weakness — insufficient to any degree of insufficiency — at another.

Among the peculiar excellencies of the English constitution, one is, that the existence of the government, and even the good conduct of it, depends in a less degree than under any other monarchy upon the personal qualifications of the chief ruler, and upon the place he occupies in the estimation of the people. Conceive the character of the chief ruler perfect to a certain degree of perfection, all checks upon his power would be a nuisance. On the other hand, under a constitution of government into which checks upon that power are admitted, the stronger and more efficient those checks, the worse the personal character of the chief ruler may be, and the business of government still go on without any fatal disturbance.

On recent occasions, as if the endeavour had been new and altogether anomalous to the constitution, great were the outcries against the audacity of those parliamentary electors and other members of the community, who, in the character of petitioners, were using their endeavours to lower the House of Commons in the estimation of the people, or, in stronger terms, to bring it and its authority into contempt. That by the individuals in question, an endeavour of this nature should be regarded as a cause of personal inconvenience, and, as such, be resisted, is natural enough; but as to its being, on the part of the authors of those exertions, blameable — or, on the part of the constitution, dangerous — surely no further observation need here be added.

But what was complained of as an abuse, was the existence of that state of things — of that system of management, under which, in a number sufficient on ordinary occasions to constitute or secure a majority, the members of that governing body have a sinister interest separate from and opposite to that of the people for whom they profess to serve: that being independent as towards those to whom they ought to be dependent, as to those whom it is their duty to controul, and towards whom they ought to be independent they are dependent; and that by means by which, though altogether out of the reach of punishment, the dependence is rendered beyond comparison more constant and effectual than it would be by acts of punishable bribery.

* More's *Observations*, pp. 77, 78.

In this state of things, if any alteration in it be desirable, it is impossible that such alteration should be brought about by other means than lowering in the estimation of the people, not only the system itself, but all those who act willingly under it, and use their endeavours to uphold it.

Without this means, and by any other means, how is it that by possibility any such change should be produced? Supposing them assured of possessing, in the event of a refusal of all such change, as high a place in the estimation of the people as they hold at present, anything done by them in furtherance of such a change would be an effect without a cause. In their personal capacities, they have all, or most of them, little to gain, while they have much to lose, by any proposed change.

True, it may be said, — to be remedied, an imperfection, be it what it may, must be pointed out. But what we complain of as dangerous to government is, not the indication of such imperfections, with their supposed remedies, but the mode in which they are apt to be pointed out — the heat, the violence, with which such indication is accompanied. This we object to, not merely as dishonest, but as unwise, — as tending to irritate the very persons at whose hands the remedy thus pleaded for is sought.

To this, the answer is as follows: —

1. Whatsoever may be the terms most decorous, and, upon the supposition, the best adapted to the obtaining of the relief desired, it is not possible to comprise them in any such scheme of description as will enable a man to satisfy himself beforehand what terms will be considered exposed to, what exempt from, censure.

2. The cause of irritation is not so properly in the terms of the application, as in the substance and nature of the application itself; so that the greatest irritation would be produced by that mode of application, whichever it were, that appeared most likely to produce the effect in question — the effect the production of which is on the one part an object of desire, on the other of aversion; the least irritation by that which, in whatever terms couched, afforded the fairest pretence for non-compliance.

3. The imperfection in question being, by the supposition, one of a public nature, the advantages of which are enjoyed by a few, while the interest which the many, each taken individually, have in the removal of the imperfection is commonly comparatively small and remote, no little difficulty is commonly experienced by any one whose endeavour it should be to persuade the many to collect amongst them a degree of impressive force sufficient to operate upon the ruling powers to the effect. On the part of the many, the natural interest being in each case commonly but weak, it requires to bring it into effective action whatsoever aids can be afforded it. Strong arguments, how strong soever, will of themselves be scarcely sufficient; for at the utmost they can amount to no more than the indication of that interest, which, in the case of the greater part of the many whose force it is necessary to bring to bear upon the point in question, is by the supposition but weak. In aid of the utmost strength of which the argument is susceptible, strength of expression will therefore be necessary, or at least naturally and generally regarded as necessary, and as such employed. But in proportion as this strength of expression is employed, the mode of application stands exposed to the imputation of that heat, and violence, and acrimony, the use of which it is the object of the alleged fallacy to prevent.

4. It is only on the supposition of its being in effect, and being felt to be, conducive, or at least not repugnant, to the interest of the ruling powers addressed, that the simple statement of the considerations which, in the character of reasons, prove the existence of the supposed imperfection, and, if a remedy be proposed, the aptitude of the proposed remedy, can with reason be expected to operate on them with effect. But the fact is, that on the part of those ruling powers, this sort of repugnance, in a degree more or less considerable, is no other than what on every such occasion ought in reason to be expected. If the imperfection in question be of the nature of those to which the term *abuse* is wont to be applied, these ruling powers have some or all of them, by the supposition, a special profit arising out of that abuse — a special interest, consequently, in the preservation and defence of it. Even if there be no such special interest, there exists in that quarter at all times, and in more shapes than one, a general and constant interest by which they are rendered mutually averse to applications of that nature. In the first place, in addition to their ordinary labours, they find themselves called upon to undertake a course of extraordinary labour, which it was not their design to undertake, and for which it may happen to some or all of them to feel themselves but indifferently prepared and qualified; and thus the application itself finds itself opposed by the interest of their case. In the next place, to the extent of the task thus imposed upon them, they find the business of government taken out of their hands. To that same extent, their conduct is determined by a will which originated not among themselves; and if, the measure being carried into effect, the promoters of it would obtain reputation, respect, and affection, — of those rewards, a share more or less considerable

falls into other hands; and thus the application in question finds an opponent in the interest of their pride.

CHAPTER V.

ACCUSATION-SCARER'S DEVICE—(*ad metum.*)

"Infamy must attach somewhere."

Exposition. — This fallacy consists in representing the imputation of purposed calumny as necessarily and justly attaching upon him who, having made a charge of misconduct against any person or persons possessed of political power or influence, fails of producing evidence sufficient for conviction.

Its manifest object, accordingly, is, as far as possible, to secure impunity to crimes and transgressions in every shape, on the part of persons so situated; viz. by throwing impediments in the way of accusation, and in particular, by holding out to the eyes of those persons who have in view the undertaking the functions of accusers, in case of failure, in addition to disappointment, the prospect of disgrace.

Exposure. — "Infamy must attach somewhere." To this effect was a *dictum* ascribed in the debates to the Right Honourable George Canning, on the occasion of the inquiry into the conduct of the Duke of York in his office of Commander-in-Chief.

In principle, insinuation to this effect has an unlimited application: it applies not only to all charges against persons possessed of political power, but, with more or less force to all criminal charges in form of law against any persons whatsoever; and not only to all charges in a prosecution of the criminal cast, but to the litigants on both sides of the cause in a case of a purely non-penal, or, as it is called, a civil nature.

If taken as a general proposition applying to all public accusations, nothing can be more mischievous as well as fallacious. Supposing the charge unfounded, the delivery of it may have been accompanied with *mâla fides* (consciousness of its injustice,) *temerity* only, or it may have been perfectly blameless. It is in the first case alone that infamy can with propriety attach upon him who brings it forward. A charge really groundless may have been honestly *believed* to be well founded; *i. e.* believed with a sort of provisional credence, sufficient for the purpose of engaging a man to do his part towards the bringing about an investigation, but without sufficient reasons. But a charge may be perfectly groundless, without attaching the smallest particle of blame upon him who brings it forward. Suppose him to have heard from one or more, presenting themselves to him in the character of percipient witnesses, a story, which either *in toto*, or perhaps only in *circumstances*, though in circumstances of the most material importance, should prove false and mendacious, — how is the person who hears this, and acts accordingly, to blame? What sagacity can enable a man, previously to legal investigation—a man who has no power that can enable him to insure correctness or completeness on the part of this extra-judicial testimony—to guard against deception in such a case? Mrs. C. states to the accuser, that the Duke of York knew of the business; stating a conversation as having passed between him and herself on the occasion. All this (suppose) is perfectly false: but the falsity of it, how was it possible for one in the accuser's situation to be apprised of?

The tendency of this fallacy is, by intimidation to prevent all true charges whatever from being made, — to secure impunity to delinquency in every shape.

But the conclusion, that because the discourse of a witness is false in one particular, or on one occasion, it must therefore be false *in toto*, — in particular, that because it is false in respect of some fact or circumstance spoken to on some extra-judicial occasion, it is therefore not credible on the occasion of a judicial examination, — is a conclusion quite unwarranted.

If this argument were consistently and uniformly applied, no evidence at all ought ever to be received, or at least to be credited: for where was ever the human being, of full age, by whom the exact line of truth had never been in any instance departed from in the whole course of his life?

The fallacy consists, not in the bringing to view, as lessening the credit due to the testimony of the witness, this or that instance of falsehood, as indicated by inconsistency or counter-evidence, but in speaking of them as *conclusive*, and as warranting the turning a deaf ear to everything else the witness has said, or, if suffered, might have said. Under the pressure of some strong and manifest falsehood-exciting interest, suppose falsehood has been uttered by the witness: be it so; does it follow that falsehood will on every occasion — will on the particular occasion in question — be uttered by him without any such excitement?

Under the pressure of terror, the Apostle Peter, when questioned whether he were one of the adherents of Jesus, who at that time was in the situation of a prisoner just arrested on a capital charge, — denied his being so; and in so doing, uttered a wilful falsehood: and this falsehood he thrice repeated within a short time: — does it follow that the testimony of the Apostle ought not on any occasion to have been considered as capable of being true?

If any such rule were consistently pursued, what judge, who had ever acted in the pro-

fession of an advocate, could with propriety be received in the character of a witness?

Again, with respect to the object of the charge, so far from receiving less countenance where the object is a public than where he is a private man, accusation, whether it be at the bar of an official judicatory or at the bar of the public at large, ought to receive beyond comparison more countenance. In case of the truth of the accusation, the mischief is greater — the demand for appropriate censure as a check to it, correspondently greater. On the other hand, in case of non-delinquency, the mischief to the groundlessly-accused individual is less. Power, in whatever hands lodged, is almost sure to be more or less abused; the check, in all its shapes, so as it does not defeat the good purposes for which the power has been given or suffered to be exercised, can never be too strong. That against a man who, by the supposition, has done nothing wrong, it is not desirable, whether his situation be public or private, that accusation should have been preferred — that he should have been subjected to the danger, and alarm, and evil in other shapes attached to it, is almost too plainly true to be worth saying. But in the case of a public accusation, though by the supposition it turns out to be groundless, it is not altogether without its use — the evil produced is not altogether without compensation; for by the alarm it keeps up in the breasts in which a disposition to delinquency has place, such accusation acts as a check upon it, and contributes to the prevention or repression of it. On the other hand, in the situation of the public man, the mischief, in the case of his having been the object of an unfounded accusation, is less, as we have shown in the preceding chapter, than in the case of a private man. In the advantages that are attached to his situation, he possesses a fund of compensation, which, by the supposition, has no place in the other case: and apprised as he ought to be, and but for his own fault is, of the enmity and envy to which, according to the nature of it, his situation exposes him, and not the private man, he ought to be, and, but for his own fault, will be, proportionably prepared to expect it, and less sensibly affected by it when it comes.

PART III. FALLACIES OF DELAY,

THE SUBJECT-MATTER OF WHICH IS DELAY IN VARIOUS SHAPES — AND THE OBJECT, TO POSTPONE DISCUSSION, WITH A VIEW OF ELUDING IT.

CHAPTER I.

THE QUIETIST, OR "NO COMPLAINT" — (*ad quietem.*)

Exposition. — A new law or measure being proposed in the character of a remedy for some incontestable abuse or evil, an objection is frequently started, to the following effect: — "The measure is unnecessary; nobody complains of disorder in that shape in which it is the aim of your measure to propose a remedy to it: even when *no* cause of complaint has been found to exist, especially under governments which admit of complaints, men have in general not been slow to complain; much less where any just cause of complaint has existed." The argument amounts to this: — Nobody complains, therefore nobody suffers. It amounts to a *veto* on all measures of precaution or prevention, and goes to establish a maxim in legislation, directly opposed to the most ordinary prudence of common life; — it enjoins us to build no parapets to a bridge till the number of accidents has raised an universal clamour.

Exposure. — The argument would have more plausibility than it has, if there were any chance of complaints being attended to — if the silence of those who suffer did not arise from despair, occasioned by seeing the fruitlessness of former complaints. The expense and vexation of collecting and addressing complaints to parliament being great and certain, complaint will not commonly be made without adequate expectation of relief. But how can any such expectation be entertained by any one who is in the slightest degree acquainted with the present constitution of parliament? Members who are independent of and irresponsible to the people, can have very few and very slight motives for attending to complaints, the redress of which would affect their own sinister interests. Again, how many complaints are repressed by the fear of attacking powerful individuals, and incurring resentments which may prove fatal to the complainant!

The most galling and the most oppressive of all grievances is that complicated mass of evil which is composed of the uncertainty, delay, expense, and vexation in the administration of justice: of this, all but a comparatively minute proportion is clearly factitious*

* See Scotch Reform, in Vol. V.

—factitious, as being the work, originally and in its foundation, of the man of law; latterly, and in respect of a part of its superstructure, of the man of finance. In extent, it is such, that of the whole population there exists not an individual who is not every moment of his life exposed to suffer under it: and few advanced in life, who, in some shape or other, have not actually been sufferers from it. By the price that has been put upon justice, or what goes by the name of justice, a vast majority of the people, to some such amount as 9-10ths or 19-20ths, are bereft altogether of the ability of putting in for a chance for it; and to those to whom, instead of being utterly denied this sort of chance, is sold, it is sold at such a price, as, to the poorest of such as have it still in their power to pay, the price is utter ruin — and even to the richest, matter of serious and sensible inconvenience.

In comparison of this one scourge, all other political scourges put together are feathers: and in so far as it has the operations of the man of finance for its cause, if, instead of one-tenth upon income, a property tax amounted to nine-tenths, still an addition to the property tax would, in comparison of the affliction produced by the sum assessed on law-proceedings, be a relief: for the income-tax falls upon none but the comparatively prosperous, and increases in proportion to the prosperity — in proportion to the ability to sustain it; whereas the tax upon law-proceedings falls exclusively upon those whom it finds labouring under affliction—under that sort of affliction which, so long as it lasts, operates as a perpetual blister on the mind.

Here, then, is matter of complaint for every British subject that breathes — here, injustice, oppression, and distress are all extreme: complaint there is none. Why? Because, by unity of sinister interest, and consequent confederacy between lawyer and financier, relief is rendered hopeless.

CHAPTER II.

FALLACY OF FALSE CONSOLATION — *(ad quietem.)*

Exposition.—A measure having for its object the removal of some abuse, *i. e.* of some practice, the result of which is, on the part of the many, a mass of suffering more than equivalent to the harvest of enjoyment reaped from it by the few, being proposed, — this argument consists in pointing to the general condition of the people in this or that other country, under the notion, that in that other country, either in the particular respect in question, or upon the whole, the condition of the people is not so felicitous as, notwithstanding the abuse, it is in the country in and for which the measure of reform is proposed.

"What is the matter with you?" "What would you have?" Look at the people there, and there: think how much better off *you* are than *they* are. Your prosperity and liberty are objects of envy to them; — your institutions are the models which they endeavour to imitate.

Assuredly, it is not to the disposition to keep an eye of preference turned to the bright side of things, where no prospect of special good suggests the opposite course, — it is not to such a disposition or such a habit, that by the word *fallacy* it is proposed to affix a mark of disapprobation.

When a particular suffering, produced as it appears by an assignable and assigned cause, has been pointed out as existing, a man, instead of attending to it himself, or inviting to it the attention of others, employs his exertions in the endeavour to engage other eyes to turn themselves to any other quarter in preference (he being of the number of those whose acknowledged duty it is to contribute their best endeavours to the affording to every affliction within their view, whatsoever relief may be capable of being afforded to it without preponderant inconvenience)—then, and then only, is it, that the endeavour becomes a just ground for censure, and the means thus employed present a title to be received upon the list of *fallacies*.

Exposure.—The pravity as well as fallaciousness of this argument can scarcely be exhibited in a stronger or truer light than by the appellation here employed to characterize it.

1. Like all other fallacies upon this list, it is nothing to the purpose.

2. In his own case, no individual in his senses would accept it. Take any one of the orators by whom this argument is tendered, or of the sages on whom it passes for sterling: with an observation of the general wealth and prosperity of the country in his mouth, instead of a half-year's rent in his hand, let any one of his tenants propose to pay him thus in his own coin, — will he accept it?

3. In a court of justice, in an action for damages, — to learned ingenuity did ever any such device occur as that of pleading assets in the hand of a third person, or in the hands of the whole country, in bar to the demand? What the largest wholesale trade is to the smallest retail, such, and more in point of magnitude, is the relief commonly sought for at the hands of the legislator, to the relief commonly sought for at the hands of the judge: — what the largest wholesale trade is to the smallest retail trade, such in point of magnitude, yea and more, is the injustice endeavoured at by this argument when employed in the seat of legislative power, in

comparison of the injustice that would be committed by deciding in conformity to it in a court of justice.

No country so wretched, so poor in every element of prosperity, in which matter for this argument might not be found.

Were the prosperity of the country ever so much greater than at present — take for the country any country whatsoever, and for present time any time whatsoever — neither the injustice of the argument, nor the absurdity of it, would in any the smallest degree be diminished.

Seriously and pointedly, in the character of a bar to any measure of relief — no, nor to the most trivial improvement, can it ever be employed. Suppose a bill brought in for converting an impassable road anywhere into a passable one, would any man stand up to oppose it who could find nothing better to urge against it than the multitude and goodness of the roads we have already? No: when in the character of a serious bar to the measure in hand, be that measure what it may, an argument so palpably inapplicable is employed, it can only be for the purpose of creating a diversion — of turning aside the minds of men from the subject really in hand, to a picture which by its beauty it is hoped, may engross the attention of the assembly, and make them forget for the moment for what purpose they came there.

CHAPTER III.

PROCRASTINATOR'S ARGUMENT
(ad socordiam.)

"Wait a little, this is not the time."

Exposition. — To the instrument of deception here brought to view, the expressions that may be given are various to an indefinite degree; but in its nature and conception nothing can be more simple.

To this head belongs every form of words by which, speaking of a proposed measure of relief, an intimation is given, that the time, whatever it be, at which the proposal is made, is too early for the purpose; and given without any proof being offered of the truth of such intimation, — such as, for instance, the want of requisite information, or the convenience of some preparatory measure.

Exposure. — This is the sort of argument or observation which we so often see employed by those who, being in wish and endeavour hostile to a measure, are afraid or ashamed of being seen to be so. They pretend, perhaps, to approve of the measure — they only differ as to the proper time of bringing it forward; but it may be matter of question whether, in any one instance, this observation has been applied to a measure by a man whose wish it was not, that it should remain excluded for ever.

It is in legislation the same sort of quirk, which in judicial procedure is called a plea in abatement. It has the same object, being never employed but on the side of a dishonest defendant, whose hope it is to obtain ultimate impunity and triumph by overwhelming his injured adversary with despair, impoverishment, and lassitude.

A serious refutation would be ill bestowed upon so frivolous a pretence. The objection exists in the will, not in the judgment, of the objector. "Is it lawful to do good on the sabbath day?" was the question put by Jesus to the official hypocrites. Which is the properest day to do good? — which is the properest day to remove a nuisance? Answer: The very first day that a man can be found to propose the removal of it; and whosoever opposes the removal of it on that day, will, if he dare, oppose the removal on every other.

The doubts and fears of the parliamentary procrastinator are the conscientious scruples of his prototype the Pharisee; and neither the answer nor the example of Jesus has succeeded in removing these scruples. To him, whatsoever is too soon to-day, be assured that to-morrow, if not too soon, it will be too late.

True it is, that, the measure being a measure of reform or improvement, an observation to this effect may be brought forward by a friend to the measure: and in this case, it is not an instrument of deception, but an expedient of unhappily necessary prudence.

Whatsoever it may be some centuries hence, hitherto the fault of the people has been, not groundless clamour against imaginary grievances, but insensibility to real ones, — insensibility, not to the effect — the evil itself, for that, if it were possible, far from being a fault, would be a happiness, — but to the cause — to the system or course of misrule which is the cause of it.

What, therefore, may but too easily be — what hitherto ever has been — the fact, and that throughout a vast proportion of the field of legislation, is, that in regard to the grievances complained of, the time for bringing forward a measure of effectual relief is not yet come. Why? Because, though groaning under the effect, the people, by the artifice and hypocrisy of their oppressors having been prevented from entertaining any tolerably adequate conception of the cause, would at that time regard either with indifference or with suspicion the healing hand that should come forward with the only true and effectual remedy. Thus it is, for example, with that Pandora's box of grievances and misery, the contents of which are composed of the evils opposite to the ends of justice.

CHAPTER IV.

SNAIL'S-PACE ARGUMENT. — (*ad socordiam.*)

"One thing at a time! Not too fast! Slow and sure!"

Exposition. — The proposed measure being a measure of reform, requiring, that for the completion of the beneficial work in question a number of operations be performed, capable, all or some of them, of being carried on at the same time, or successively without intervals, or at short intervals, the instrument of deception here in question consists in holding up to view the idea of graduality or slowness, as characteristic of the course which wisdom would dictate on the occasion in question. For more effectual recommendation of this course, to the epithet *gradual* are commonly added some such eulogistic epithets as *moderate* and *temperate;* whereby it is implied, that in proportion as the pace recommended by the word *gradual* is quickened, such increased pace will justly incur the censure expressed by the opposite epithets, immoderate, violent, precipitate, extravagant, intemperate.

Exposure. — This is neither more nor less than a contrivance for making out of a mere word an excuse for leaving undone an indefinite multitude of things, which the arguer is convinced, and cannot forbear acknowledging, ought to be done.

Suppose half a dozen abuses, which equally and with equal promptitude stand in need of reform — this fallacy requires, that without any reason that can be assigned, other than what is contained in the pronouncing or writing of the word *gradual*, all but one or two of them shall remain untouched.

Or, what is better, suppose that, to the effectual correction of some one of these abuses, six operations require to be performed — six operations, all of which must be done ere the correction can be effected, — to save the reform from the reproach of being violent and intemperate, to secure to it the praise of graduality, moderation, and temperance, you insist, that of these half-a-dozen necessary operations, some one or some two only shall be talked of, and proposed to be done; — one, by one bill to be introduced this session, if it be not too late (which you contrive it shall be;) another, the next session; which time being come, nothing more is to be said about the matter — and there it ends.

For this abandonment, no one reason that will bear looking at can be numbered up, in the instance of any one of the five measures endeavoured to be laid upon the shelf; for if it could, that would be the reason assigned for the relinquishment, and not this unmeaning assemblage of three syllables.

A suit which, to do full justice to it, requires but six weeks, or six days, or six minutes in one day — has it been made to last six years? That your caution and your wisdom may not be questioned, by a first experiment reduce the time to five years; then if that succeeds, in another parliament, should another parliament be in a humour (which it is hoped it will not,) reduce it to four years; then again to three years; and if it should be the lot of your grandchildren to see it reduced to two years, they may think themselves well off, and admire your prudence.

Justice — to which in every eye but that of the plunderer and oppressor, rich and poor have an equal right — do nine-tenths of the people stand excluded from all hope of, by the load of expense that has been heaped up. You propose to reduce this expense. The extent of the evil is admitted, and the nature of the remedy cannot admit of doubt; but by the magic of the three syllables *gra-du-al*, you will limit the remedy to the reduction of about one-tenth of the expense. Some time afterwards you may reduce another tenth, and go on so, that in about two centuries, justice may, perhaps, become generally accessible.

Importance of the business — extreme difficulty of the business — danger of innovation — need of caution and circumspection — impossibility of foreseeing all consequences — danger of precipitation — everything should be gradual — one thing at a time — this is not the time — great occupation at present — wait for more leisure — people well satisfied — no petitions presented — no complaints heard — no such mischief has yet taken place — stay till it has taken place: — such is the prattle which the magpie in office, who, understanding nothing, understands that he must have something to say on every subject shouts out among his auditors as a succedaneum to thought.

Transfer the scene to domestic life, and suppose a man who, his fortune not enabling him without running into debt to keep one race-horse, has been for some time in the habit of keeping six: to transfer to this private theatre the wisdom and the benefit of the gradual system, what you would have to recommend to your friend would be something of this sort: — Spend the first year in considering which of your six horses to give up; the next year, if you can satisfy yourself which it shall be, give up some one of them: by this sacrifice, the sincerity of your intention and your reputation for economy will be established; which done, you need think no more about the matter.

As all psychological ideas have their necessary root in physical ones, one source of delusion in psychological arguments consists in giving an improper extension to some metaphor which has been made choice of.

It would be a service done to the cause of truth, if some advocate for the gradual system would let us into the secret of the metaphor or physical image, if any, which he has in view, and in the same language give us the idea of some physical disaster as the result of precipitation. A patient killed by rapid bleeding — a chariot dashed in pieces by runaway steeds — a vessel overset by carrying too much sail in a squall, — all these images suppose a degree of precipitation which, if pursued by the proposers of a political measure, would be at once apparent, and the obvious and assignable consequence of their course would afford unanswerable arguments against them.

All this while, though by a friend to the measure no such word as above will be employed in the character of argument, yet cases are not wanting in which the dilatory course recommended may be consented to, or even proposed by him.

Suppose a dozen distinct abuses in the seat of legislative power, each abuse having a set of members interested in the support of it, — attack the whole body at once, all these parties join together to a certainty, and oppose you with their united force. Attack the abuses one by one, and it is possible that you may have but one of these parties, or at least less than all of them, to cope with at a time. Possible? Yes: but of probability, little can be said. To each branch of the public service belongs a class of public servants, each of which has its sinister interest, the source of the mass of abuses on which it feeds; and in the person and power of the universal patron, the fountain of all honour and of all abuse, all those sinister interests are joined and embodied into one.

This is a branch of science in which no man is ever deficient; this is what is understood — understood to perfection, by him to whom nothing else ever was or can be clear, — *Hoc discunt omnes*, unto *alpha et beta puelli*.

If there be a case in which such graduality as is here described can have been consented to, and with a reasonable prospect of advantage, it must have been a case in which, without such consent, the whole business would be hopeless.

Under the existing system, by which the door of the theatre of legislation is opened by opulence to members in whose instance application of the faculty of thought to the business about which they are supposed to occupy themselves would have been an effect without a cause, so gross is the ignorance, and in consequence, even where good intention is not altogether wanting, so extreme the timidity and apprehension, that on their part, without assurance of extreme slowness, no concurrence to a proposal for setting one foot before another, at even the slowest pace, would be obtained at all; their pace, the only pace at which they can be persuaded to move, is that which the traveller would take, whose lot it should be to be travelling in a pitch-dark night over a road broken and slippery, edged with precipices on each side. Time is requisite for quieting timidity: why? Because time is requisite for instructing ignorance.

Lawyers; their interest in the employment of this fallacy.

In proportion to the magnitude of their respective shares in the general fund of abuse, the various fraternities interested in the support of abuses have each of them their interest in turning to the best account this as well as every other article in the list of fallacies.

But it is the fraternity of lawyers, who (if they have not decidedly the most to gain by the dexterous management of this or of other fallacies) have, from the greatest quantity of practice, derived the greatest degree of dexterity in the management of it.

Judicature requiring reflection, and the greater the complication of the case, the greater the degree and length of reflection which the case requires: under favour of this association, they have succeeded in establishing a general impression of a sort of proportion in quantity, as well as necessity of connexion, between delay and attention to justice. Not that, in fact, a hundredth part of the established delay has had any origin in a regard for justice; but — for want of sufficient insight into that state of things by which, in persons so circumstanced in power and interest, the general prevalence of any such regard has been rendered physically impossible — in his endeavours to propagate the notion of a sort of general proportion between delay and regard for justice, the man of law has, unhappily, been but too successful. And it is, perhaps, to this error in respect to matters of fact, that the snail's-pace fallacy is indebted, more than to any other cause, for its dupes. Be this as it may, sure it is, that in no track of reform has the rate of progress which it is the object of this fallacy to secure, been adhered to with greater effect. By the statute-book, if run over (and little more than the titles would be necessary) in this view, a curious exemplification of the truth of this observation is afforded. An abuse so monstrous, that, on the part of the judicial hands by which it was manufactured, the slightest doubt of the mischievousness of it was absolutely impossible; — generation after generation groaning under this abuse; — and at length, when, by causes kept of course as much as possible out of sight, the support of the abuse has been deemed no longer practi-

cable, comes at length a remedy. And what remedy? Never anything better than a feeble palliative.

CHAPTER V.

FALLACY OF ARTFUL DIVERSION — (*ad verecundiam.*)

Exposition and Exposure. — The device here in question may be explained by the following direction or receipt for the manufacture and application of it: —

When any measure is proposed, which on any account whatsoever it suits your interest or your humour to oppose, at the same time that, in consideration of its undeniable utility, or on any other account, you regard it unadvisable to pass direct condemnation on it, — hold up to view some other measure, such as, whether it bear any relation or none to the measure on the carpet, will, in the conception of your hearers, present itself as superior in the order of importance. Your language then is, — Why that? (meaning the measure already proposed) — why not this? or this? mentioning some other, which it is your hope to render more acceptable, and by means of it to create a diversion, and turn aside from the obnoxious measure the affections and attention of those whom you have to deal with.

One case there is, in which the appellation of fallacy cannot with justice be applied to this argument; and that is, where the effectuation or pursuit of the measure first proposed would operate as a bar or an obstacle to some other measure of a more beneficial character held up to view by the argument as competitor with it: and what, in the way of Exposure, will be said of the sort of expedient just described, will not apply to this case.

However, where the measure first proposed is of unquestionable utility, and you oppose it merely because it is adverse to your own sinister interest, you must not suggest any relevant measure of reform in lieu of it, except in a case in which, in the shape of argument, every mode of opposition is considered as hopeless; for unless for the purpose of forestalling the time and attention that would be necessary to the effectuation of the proposed beneficial measure, a measure altogether irrelevant and foreign to it is set up, a risk is incurred, that something, however inferior in degree, may be effected towards the diminution of the abuse or imperfection in question.

In the character of an irrelevant counter-measure, any measure or accidental business whatever may be made to serve, so long as it can be made to pre-occupy a sufficient portion of the disposable time and attention of the public men on whose suffrages the effectuation or frustration of the measure depends.

But supposing the necessity for a relevant counter-measure to exist, and that you have accordingly given introduction to it, the first thing then to be done is, to stave off the undesirable moment of its effectuation as long as possible.

According to established usage, you have given notice of your intention to propose a measure on the subject and to the effect in question. The intention is of too great importance to be framed and carried into act in the compass of the same year or session: you accordingly announce your intention for next session. When the next session comes, the measure is of too great importance to be brought on the carpet at the commencement of the session; at that period it is not yet mature enough. If it be not advisable to delay it any longer, you bring it forward just as the session closes. Time is thus gained, and without any decided loss in the shape of reputation; for what you undertook, has to the letter been performed. When the measure has been once brought in, you have to take your choice, in the first place, between operations for delay and operations for rejection. Operations for delay exhibit a manifest title to preference: so long as their effect can be made to last, they accomplish their object, and no sacrifice either of design or of reputation has been made. The extreme importance and extreme difficulty are themes on which you blow the trumpet, and which you need not fear the not hearing sufficiently echoed. When the treasury of delay has been exhausted, you have your choice to take between trusting to the chapter of accidents for the defeat of the measure, or endeavouring to engage some friend to oppose it, and propose the rejection of it. But you must be unfortunate indeed, if you can find no opponents, no tolerably plausible opponents, unless among friends, and friends specially commissioned for the purpose: a sort of confidence more or less dangerous must in that case be reposed.

Upon the whole, you must however be singularly unfortunate or unskilful, if by the counter-measure of diversion any considerable reduction of the abuse or imperfection be, spite of your utmost endeavours, effected, or any share of reputation that you need care about, sacrificed.

PART IV. FALLACIES OF CONFUSION,

THE OBJECT OF WHICH IS, TO PERPLEX, WHEN DISCUSSION CAN NO LONGER BE AVOIDED.

CHAPTER I.

QUESTION-BEGGING APPELLATIVES — (*ad judicium.*)

Petitio principii, or begging the question, is a fallacy very well known even to those who are not conversant with the principles of logic. In answer to a given question, the party who employs the fallacy contents himself by simply affirming the point in debate. Why does opium occasion sleep? Because it is soporiferous.

Begging the question is one of the fallacies enumerated by Aristotle; but Aristotle has not pointed out (what it will be the object of this chapter to expose) the mode of using the fallacy with the greatest effect, and least risk of detection, — namely, by the employment of a single appellative.

Exposition and Exposure. — Among the appellatives employed for the designation of objects belonging to the field of moral science, there are some by which the object is presented singly, unaccompanied by any sentiment of approbation or disapprobation attached to it — as, *desire*, *labour*, *disposition*, *character*, *habit*, &c. With reference to the two sorts of appellatives which will come immediately to be mentioned, appellatives of this sort may be termed *neutral*.

There are others, by means of which, in addition to the principal object, the idea of general approbation as habitually attached to that object is presented — as, *industry*, *honour*, *piety*, *generosity*, *gratitude*, &c. These are termed *eulogistic* or laudatory.

Others there are, again, by means of which, in addition to the principal object, the idea of general disapprobation, as habitually attached to that object, is presented — as, *lust*, *avarice*, *luxury*, *covetousness*, *prodigality*, &c. These may be termed *dyslogistic* or vituperative.*

Among pains, pleasures, desires, emotions, motives, affections, propensities, dispositions, and other moral entities, some, but very far from all, are furnished with appellatives of all three sorts: — some, with none but eulogistic; others, and in a greater number, with none but those of the dyslogistic cast. By appellatives, I mean here, of course, *single-worded* appellatives; for by words, take but enough of them, anything may be expressed.

Originally, all terms expressive of any of these objects were (it seems reasonable to think) neutral. By degrees they acquired, some of them an eulogistic, some a dyslogistic, cast. This change extended itself, as the *moral sense* (if so loose and delusive a term may on this occasion be employed) advanced in growth.

But to return. As to the mode of employing this fallacy, it neither requires nor so much as admits of being taught: a man falls into it but too naturally of himself; and the more naturally and freely, the less he finds himself under the restraint of any such sense as that of shame. The great difficulty is to unlearn it: in the case of this, as of so many other fallacies, by teaching it, the humble endeavour here is, to unteach it.

In speaking of the *conduct*, the *behaviour*, the *intention*, the *motive*, the *disposition* of this or that man, — if he be one who is indifferent to you, of whom you care not whether he be well or ill thought of, you employ the *neutral* term: — if a man whom, on the occasion and for the purpose in question, it is your object to recommend to favour, especially a man of your own party, you employ the *eulogistic* term: — if he be a man whom it is your object to consign to aversion or contempt, you employ the *dyslogistic* term.

To the proposition of which it is the leading term, every such eulogistic or dyslogistic appellative, secretly, as it were, and in general insensibly, slips in another proposition of which that same leading term is the subject, and an assertion of approbation or disapprobation the predicate. The person, act, or thing in question, is *or* deserves to be, or is *and* deserves to be, an object of general approbation; or the person, act, or thing in question, is or deserves to be, or is and deserves to be, an object of general disapprobation.

The proposition thus asserted is commonly a proposition that requires to be proved. But in the case where the use of the term thus employed is fallacious, the proposition is one

* See the nature of these denominations amply illustrated in *Springs-of-Action Table*, in Vol. I. Of the field of thought and action, this, the moral department, though it be that part in which the most abundant employment is given to the instrument of deception here in question, is not the only part. Scarcely, perhaps, can any part be found, to which it has not been applied.

that is not true, and cannot be proved: and where the person by whom the fallacy is employed is conscious of its deceptive tendency, the object in the employment thus given to the appellative is, by means of the artifice, to cause that to be taken for true, which is not so.

By appropriate eulogistic and dyslogistic terms, so many arguments are made, by which, taking them altogether, misrule, in all its several departments, finds its justifying arguments, and these in but too many eyes, conclusive. Take, for instance, the following eulogistic terms: —

1. In the war department, — *honour* and *glory*.

2. In international affairs, — *honour*, *glory*, and *dignity*.

3. In the financial department, *liberality*. It being always at the expense of unwilling contributors that this *virtue* (for among the *virtues* it has its place in *Aristotle*) is exercised—for *liberality*, *depredation* may, in perhaps every case, and without any impropriety, be substituted.

4. In the higher parts of all official departments, *dignity* — *dignity*, though not in itself depredation, operates as often as the word is used, as a pretence for, and thence as a cause of depredation. Wherever you see *dignity*, be sure that money is requisite for the *support* of it: and that, in so far as the dignitary's own money is regarded as insufficient, public money, raised by taxes imposed on all other individuals, on the principle of *liberality*, must be found for the supply of it.*

Exercised at a man's own expense, liberality may be, or may not be, according to circumstances, a virtue: — exercised at the expense of the public, it never can be anything better than vice. Exercised at a man's own expense, whether it be accompanied with prudence or no — whether it be accompanied or not with beneficence, it is at any rate disinterestedness: — exercised at the expense of the public, it is pure selfishness: it is, in a word, depredation: money or money's worth is taken from the public to purchase, for the use of the liberal man, respect, affection, gratitude, with its eventual fruits in the shape of services of all sorts — in a word, reputation, power.

When you have a practice or measure to condemn, find out some more general appellative, within the import of which the obnoxious practice or measure in question cannot be denied to be included, and to which you, or those whose interests and prejudices you have espoused, have contrived to annex a certain degree of unpopularity, in so much that the name of it has contracted a dyslogistic quality — has become a bad name.

Take, for example, *improvement* and *innovation*: under its own name to pass censure on any improvement might be too bold: applied to such an object, any expressions of censure you could employ might lose their force; employing them, you would seem to be running on in the track of self-contradiction and nonsense.

But improvement means something new, and so does *innovation*. Happily for your purpose, *innovation* has contracted a bad sense; it means something which is new and bad at the same time. Improvement, it is true, in indicating something new, indicates something good at the same time; and therefore, if the thing in question be good as well as new, innovation is not a proper term for it. However, as the idea of *novelty* was the only idea originally attached to the term innovation, and the only one which is directly expressed in the etymology of it, you may still venture to employ the word innovation, since no man can readily and immediately convict your appellation of being an improper one upon the face of it.

With the appellation thus chosen for the purpose of passing condemnation on the measure, he by whom it has been brought to view in the character of an improvement, is not (it is true) very likely to be well satisfied: but of this you could not have had any expectation. What you want is a pretence which your own partisans can lay hold of, for the purpose of deducing from it a colourable warrant for passing upon the improvement that censure which you are determined, and they, if not determined, are disposed and intend to pass on it.

Of this instrument of deception, the potency is most deplorable. It is but of late years that so much as the nature of it has in any way been laid before the public: and now that it has been laid before the public, the need there is of its being opposed with effect, and the extreme difficulty of opposing it with effect, are at the same time and in equal degree manifest. In every part of the field of thought and discourse, the effect of language depends upon the principle of association — upon the association formed between words, and those ideas of which, in that way, they have become the signs. But in no small part of the field of discourse, one or other of the two censorial and reciprocally correspondent and opposite affections — the amicable and the hostile — that by which approbation, and that by which disapprobation, is expressed — are associated with the word in question by a tie little less strong than that by which the object in question, be it person or thing — be the thing a real or fictitious entity — be it operation or quality, is associated with that

* See this principle avowed and maintained by the scribes of both parties, Burke and Rose, as shown in the *Defences of Economy* against those advocates of depredation, — in Vol. V.

same articulate audible sign and its visible representations.

To diminish the effect of this instrument of deception (for to do it away completely, to render all minds, without exception, at all times insensible to it, seems scarcely possible) must, at any rate, be a work of time. But in proportion as its effect on the understanding, and through that channel on the temper and conduct of mankind, is diminished, the good effect of the exposure will become manifest.

By such of these passion-kindling appellatives as are of the eulogistic cast, comparatively speaking, no bad effect is produced: but by those which are of the dyslogistic, prodigious is the mischievous effect produced, considered in a moral point of view. By a single word or two of this complexion, what hostility has been produced! how intense the feeling of it! how wide the range of it! how full of mischief, in all imaginable shapes, the effects!*

CHAPTER II.

IMPOSTOR TERMS — (*ad judicium.*)

Exposition. — The fallacy which consists in the employment of impostor terms, in some respects resembles that which has been exposed in the preceding chapter; but it is applied chiefly to the defence of things, which under their proper name are manifestly indefensible. Instead, therefore, of speaking of such things under their proper name, the sophist has recourse to some appellative, which, along with the indefensible object, includes some other — generally an object of favour; or at once substitutes an object of approbation for an object of censure. For instance, persecutors in matters of religion have no such word as persecution in their vocabulary: *zeal* is the word by which they characterize all their actions.

In the employment of this fallacy, two things are requisite: —

1. A fact or circumstance, which, under its proper name, and seen in its true colours, would be an object of censure, and which, therefore, it is necessary to disguise: — (*res tegenda.*)

2. The appellative which the sophist employs to conceal what would be deemed offensive, or even to bespeak a degree of favour for it by the aid of some happier accessary: — (*tegumen.*)†

Exposure. — Example: *Influence of the Crown.* — The sinister influence of the crown is an object which, if expressed by any peculiar and distinctive appellation, would, comparatively speaking, find perhaps but few defenders; but which, so long as no other denomination is employed for the designation of it than the generic term *influence*, will rarely meet with indiscriminating reprobation.

Corruption, — the term which, in the eyes of those to whom this species of influence is an object of disapprobation, is the appropriate and only single-worded term capable of being

* As an instance remarkable enough, though not in respect of the mischievousness, yet in respect of the extent and the importance of the effects producible by a single word, note Lord Erskine's defence of the Whigs, avowedly produced by the application of the dyslogistic word *faction* to that party in the state.

† The device here in question is not peculiar to politicians. By an example drawn from private life, it may to some eyes be placed, perhaps, in a clearer point of view. The word *gallantry* is employed to denote either of two dispositions, which, though not altogether without connexion, may either of them exist without the other. In one of these senses, it denotes, on the part of the stronger sex, the disposition to testify on all occasions towards the weaker sex those sentiments of respect and kindness by which civilized is so strikingly and happily distinguished from savage life. In the other sense, it is, in the main, synonymous to *adultery*: yet not so completely synonymous (as indeed words perfectly synonymous are of rare occurrence) but that, in addition to this sense, it presents an accessary and collateral one. Having, from the habit of being employed in the other sense, acquired, in addition to its direct sense, a collateral sense of the eulogistic cast, it serves to give to the act, habit, or disposition, which in this sense it is employed to present, something of an eulogistic tincture, in lieu of that dyslogystic colouring under which the object is presented by its direct and proper name. Whatever act a man regards himself as being known to have performed, or meditates the performance of, under any expectation of his being eventually known to have performed it, he will not, in speaking of it, make use of any term the tendency of which is to call forth, on the part of the hearer or reader, any sentiment of disapprobation pointed at the sort of act in question, and consequently, through the medium of the act, at the agent by whom it has been performed. To the word *adultery*, this effect, to every man more or less unpleasant, is attached by the usage of language. On every occasion in which it is necessary to his purpose to bring to view an act of this obnoxious description, he will naturally be on the look-out for a term in the use of which he may be supposed to have had another meaning, and which, in so far as it conveys an idea of the forbidden act in question, presents it with an accompaniment, not of reproach, but rather of approbation, which in general would not have accompanied it but for the other signification which the word is also employed to designate. This term he finds in the word *gallantry*.

There is a sort of man, who, whether ready or no to commit any act or acts of adultery, would gladly be thought to have been habituated to the commission of such acts: but even this sort of man would neither be found to say of himself, "I am an adulterer," nor pleased to have it said of him, "He is an adulterer." But to have it said of him that he is a man of gallantry, — this is what the sort of man in question would regard as a compliment, with the sound of which he would be pleased and flattered.

employed for the expression of it — is a term of the *dyslogistic* cast. This, then, by any person whose meaning it is not to join in the condemnation passed on the practice or state of things which is designated, is one that cannot possibly be employed. In speaking of this practice and state of things, he is therefore obliged to go upon the look-out, and find some term, which, at the same time that its claim to the capacity of presenting to view the object in question cannot be contested, shall be of the eulogistic or at least of the neutral cast; and to one or other of these classes belongs the term *influence*.

Under the term *influence*, when the crown is considered as the possessor of it, are included two species of influence: the one of them such, that the removal of it could not, without an utter reprobation of the monarchical form of government, be by any person considered as desirable, nor, without the utter destruction of monarchical government, be considered as possible;—the other such—that in the opinion of many persons, the complete destruction or removal of it would, if possible, be desirable, — and that, though consistently with the continuance of the monarchical government, the complete removal of it would not be practicable, yet the diminution of it to such a degree as that the remainder should not be productive of any practically pernicious effects would not be impracticable.

Influence of *will on will* — influence of *understanding on understanding:* in this may be seen the distinction on which the utility or noxiousness of the sort of influence in question depends.

In the influence of understanding on understanding, may be seen that influence to which, by whomsoever exercised, on whomsoever exercised, and on what occasion soever exercised, the freest range ought to be left — left, although, as for instance, exercised by the crown, and on the representatives of the people. Not that to this influence it may not happen to be productive of mischief to any amount; but that because without this influence scarce any good could be accomplished, and because, when it is left free, disorder cannot present itself without leaving the door open at least for the entrance of the remedy.

The influence of understanding on understanding is, in a word, no other than the influence of human reason — a guide which, like other guides, is liable to miss its way, or dishonestly to recommend a wrong course, but which is the only guide of which the nature of the case is susceptible.

Under the British constitution, to the crown belongs either the sole management, or a principal and leading part of the management of the public business: and it is only by the influence of understanding on understanding, or by the influence of will on will, that by any person or persons, except by physical force immediately applied, anything can be done.

To the execution of the ordinary mass of duties belonging to the crown, the influence of will on will, so long as the persons on whom it is exercised are the proper persons, is necessary. On all persons to whom it belongs to the crown to give *orders*, this species of influence is necessary; for it is only in virtue of this species of influence that *orders*, considered as delivered from a superordinate to a subordinate — considered in a word as *orders*, in contradistinction to mere suggestions, or arguments operating by the influence of understanding on understanding, — can be productive of any effect.

Thus far, then, in the case of influence of will on will, as well as in the case of influence of understanding on understanding, no rational and consistent objection can be made to the use of influence. In either case, its title to the epithet *legitimate* influence is above dispute.

The case, among others, in which the title of the influence of the crown is open to dispute — the case in which the epithet *sinister*, or any other mark of disapprobation, may be bestowed upon it (bestowed upon the bare possession, and without need of reference to the particular use and application which on any particular occasion may happen to be made of it,) — is that where, being of that sort which is exercised by will on will, the person on whom on the occasion in question it is exercised, is either a member of parliament, or a person possessed of an electoral vote with reference to a seat in parliament.

The ground on which this species of influence thus exercised is, by those by whom it is spoken of with disapprobation, represented as *sinister*, and deserving of that disapprobation, is simply this: — viz. that in so far as this influence is efficient, the will professed to be pronounced is not in truth the will of him whose will it professes to be, but the will of him in whom the influence originates, and from whom it proceeds: in so much, that if, for example, every member of parliament without exception were in each house under the dominion of the influence of the crown, and in every individual instance that influence were effectual, — the monarchy, instead of being the limited sort of monarchy it professes to be, would be in effect an absolute one — in form alone a limited one; nor so much as in form a limited one any longer than it happened to be the pleasure of the monarch that it should continue to be so.

The functions attached to the situation of a member of parliament may be included, most or all of them, under three denominations — the legislative, the judicial, and the

inquisitorial: the legislative, in virtue of which, in each House, each member that pleases takes a part in the making of laws; the judicial, which, whether penal cases or cases non-penal be considered, is not exercised to any considerable extent but by the House of Lords; and the inquisitorial, the exercise of which is performed by an inquiry into facts, with a view to the exercise either of legislative authority, or of judicial authority, or both, whichever the case may be found to require. To the exercise of either branch may be referred what is done, when, on the ground of some defect either in point of moral or intellectual fitness, or both, application is made by either house for the removal of any member or members of the executive branch of the official establishment — any servant or servants of the crown.

But, for argument's sake, suppose the above-mentioned extreme case to be realized, all these functions are equally nugatory. Whatever law is acceptable to the crown, will be not only introduced but carried; no law that is not acceptable to the crown, will be so much as introduced: every judgment that is acceptable to the crown will be pronounced; no judgment that is not acceptable to the crown will be pronounced: every inquiry that is acceptable to the crown will be made; no inquiry that is not acceptable to the crown will be made: and in particular, let, on the part of the servants of the crown, any or all of them, misconduct in every imaginable shape be ever so enormous, no application that is not acceptable to the crown will ever be made for their removal; that is, no such application will ever be made at all: for in this state of things, supposing it, in the instance of any servant of the crown, to be the pleasure of the crown to remove him, he will be removed of course; nor can any such application be productive of anything better than needless loss of time.

Raised to the pitch supposed in this extreme case, there are not, it is supposed, many men in the country, by whom the influence of the crown, of that sort which is exercised by the will of the crown on the wills of members of parliament, would not be really regarded as coming under the denomination of sinister influence; not so much as a single one by whom its title to that denomination would be openly denied.

But among members of parliament, many there are on whom, beyond possibility of denial, this sort of influence — influence of will on will — is exerted: since no man can be in possession of any desirable situation from which he is removable, without its being exerted on him; say rather, without its exerting itself on him: for to the production of the full effect of influence, no act, no express intimation of will on the part of any person, is in any such situation necessary.

Here, then, comes the grand question in dispute. In some opinions, of that sort of influence of will on will, exercising itself from the crown on a member of parliament, or at any rate on a member of the House of Commons, composed of the elected representatives of the people, not any the least particle is necessary — not any the least particle is in any way beneficial — not any the least particle, in so far as it is operative, can be other than pernicious.

In the language of those by whom this opinion is held, every particle of such influence is sinister influence, corrupt or corruptive influence, or, in one word, corruption.

Others there are, in whose opinion, or at any rate, if not in their opinion, in whose language, of that influence thus actually exercising itself, the whole, or some part at any rate, is not only innoxious but beneficial, and not only beneficial but — to the maintenance of the constitution in a good and healthful state — absolutely necessary: and to this number must naturally be supposed to belong all those on whom this obnoxious species of influence is actually exercising itself.

CHAPTER III.

VAGUE GENERALITIES — (*ad judicium.*)

Exposition. — Vague generalities comprehend a numerous class of fallacies, resorted to by those who, in preference to the most particular and determinate terms and expressions which the nature of the case in question admits of, employ others more general and indeterminate.

An expression is vague and ambiguous when it designates, by one and the same appellative, an object which may be good or bad, according to circumstances; and if, in the course of an inquiry touching the qualities of such an object, such an expression is employed without a recognition of this distinction, the expression operates as a fallacy.

Take, for instance, the terms, *government, laws, morals, religion.* The *genus* comprehended in each of these terms may be divided into two species — the *good* and *bad;* for no one can deny that there have been and still are in the world, bad governments, bad laws, bad systems of morals, and bad religions. The bare circumstance, therefore, of a man's attacking government or law, morals or religion, does not of itself afford the slightest presumption that he is engaged in anything blameable: if his attack is only directed against that which is bad in each, his efforts may be productive of good to any extent.

This essential distinction the defender of abuse takes care to keep out of sight, and boldly imputes to his antagonist an intention to subvert all governments, laws, morals or religion.

But it is in the way of insinuation, rather than in the form of direct assertion, that the argument is in this case most commonly brought to bear. Propose anything with a view to the improvement of the existing practice in relation to government at large, to the law, or to religion, he will treat you with an oration on the utility and necessity of government, of law, or of religion. To what end? To the end that of your own accord you may draw the inference which it is his desire you should draw, even that what is proposed has in its tendency something which is prejudicial to one or other or all of these objects of general regard. Of the truth of the intimation thus conveyed, had it been made in the form of a direct assertion or averment, some proof might naturally have been looked for: by a direct assertion, a sort of notice is given to the hearer or reader to prepare himself for someting in the shape of proof; but when nothing is asserted, nothing is on the one hand offered, nothing on the other expected, to be proved.

1. *Order.*

Exposure. — Among the several cloudy appellatives which have been commonly employed as cloaks for misgovernment, there is none more conspicuous in this atmosphere of illusion than the word *Order*.

The word *order* is in a peculiar degree adapted to the purpose of a cloak for *tyranny* — the word *order* is more extensive than law, or even than government.

But, what is still more material, the word *order* is of the eulogistic cast; whereas the words *government* and *law*, howsoever the things signified may have been taken in the lump for subjects of praise, the complexion of the signs themselves is still tolerably neutral: just as is the case with the words *constitution* and *institutions*.

Thus, whether the measure or arrangement be a mere transitory measure or a permanent law — if it be a tyrannical one, be it ever so tyrannical, in the word *order* you have a term not only wide enough, but in every respect better adapted than any other which the language can supply, to serve as a cloak for it. Suppose any number of men, by a speedy death or a lingering one, destroyed for meeting one another for the purpose of obtaining a remedy for the abuses by which they are suffering — what nobody can deny is, that by their destruction, *order* is maintained; for the *worst* order is as truly *order* as the *best*. Accordingly, a clearance of this sort having been effected, suppose in the House of Commons a Lord Castlereagh, or in the House of Lords a Lord Sidmouth, to stand up and insist, that by a measure so undeniably prudential order was maintained, with what truth could they be contradicted? And who is there that would have the boldness to assert that order ought not to be maintained?

To the word *order*, add the word *good*, the strength of the checks, if any there were, that were thus applied to tyranny, would be but little if at all increased. By the word *good*, no other idea is brought to view than that of the sentiment of approbation, as attached by the person by whom it is employed to the object designated by the substantive to which this adjunct is applied. Order is any arrangement which exists with reference to the object in question; — good order is that order, be it what it may, which it is my wish to be thought to approve of.

Take the state of things under *Nero*, under *Caligula*: with as indisputable propriety might the word *order* be applied to it, as to the state of things at present in Great Britain or the American United States.

What in the eyes of Bonaparte was good order? That which it had been his pleasure to establish.

By the adjunct *social*, the subject *order* is perhaps rendered somewhat the less fit for the use of tyrants, but not much. Among the purposes to which the word *social* is employed, is indeed that of bringing to view a state of things favourable to the happiness of society: but a purpose to which it is also employed, is that of bringing to view a state of things no otherwise considered than as having place in society. By the war which in the Roman history bears the name of the social war, no great addition to the happiness of society was ever supposed to be made; yet it was not the less a social one.

As often as any measure is brought forward having for its object the making any the slightest defalcation from the amount of the sacrifice made of the interest of the many to the interest of the few, *social* is the adjunct by which the *order* of things to which it is pronounced hostile, is designated.

By a defalcation made from any part of the mass of factitious delay, vexation, and expense, out of which, and in proportion to which, lawyers' profit is made to flow — by any defalcation made from the mass of needless and worse than useless emolument to office, with or without service or pretence of service — by any addition endeavoured to be made to the quantity, or improvement in the quality of service rendered, or time bestowed in service rendered in return for such emolument — by every endeavour that has for its object the persuading the people to place their fate at the disposal of any other agents than those in whose hands breach of trust is certain, due fulfilment of it morally and physically impossible, — *social order* is said to be endangered, and threatened to be destroyed.

Proportioned to the degree of clearness with which the only true and justifiable end

of government is held up to view in any discourse that meets the public eye, is the danger and inconvenience to which those rulers are exposed, who, for their own particular interest, have been engaged in an habitual departure from that only legitimate and defensible course. Hence it is, that, when compared with the words *order*, *maintenance of order*, the use even of such words as *happiness*, *welfare*, *well-being*, is not altogether free from danger, wide-extending and comparatively indeterminate as the import of them is: to the single word *happiness*, substitute the phrase *greatest happiness of the greatest number*, the description of the end becomes more determinate and even instructive, the danger and inconvenience to misgovernment and its authors and its instruments still more alarming and distressing; for then, for a rule whereby to measure the goodness or badness of a government, men are referred to so simple and universally apprehensible a standard as the numeration table. By the pointing men's attentions to this end, and the clearness of the light thus cast upon it, the importance of such words as the word *order*, which by their obscurity substitute to the offensive light the useful and agreeable darkness, is more and more intimately felt.

2. *Establishment.*

In the same way, again, *Establishment* is a word in use, to protect the bad parts of establishments, by charging those who wish to remove or alter them, with the wish to subvert all establishments, or all good establishments.*

3. *Matchless Constitution.*

The constitution has some good points; it has some bad ones: it gives facility, and, until reform — radical reform — shall have been accomplished, security and continual increase to waste, depredation, oppression, and corruption in every department, and in every variety of shape.

Now, in their own name respectively, waste depredation, oppression, corruption, cannot be toasted: gentlemen would not cry, Waste for ever! Depredation for ever! Oppression for ever! Corruption for ever! But The constitution for ever! this a man may cry, and does cry, and makes a merit of it.

Of this instrument of rhetoric, the use is at least as old as Aristotle. As old as Aristotle is even the receipt for making it; for Aristotle has himself given it: and of how much longer standing the use of it may have been, may baffle the sagacity of a Mitford to determine. How sweet are gall and honey! how white are soot and snow!

Matchless Constitution! there's your sheet-anchor! there's your true standard! — rally round the constitution; — that is, rally round waste, rally round depredation, rally round oppression, rally round corruption, rally round election terrorism, rally round imposture — imposture on the hustings, imposture in Honourable House, imposture in every judicatory.

Connected with this toasting and this boasting, is a theory, such as a Westminster or Eton boy on the sixth form, aye, or his grandmother, might be ashamed of. For among those who are loudest in crying out theory (as often as any attempt is made at reasoning, any appeal made to the universally known and indisputable principles of human nature,) always may some silly sentimental theory be found.

The constitution, — why must it not be looked into? — why is it, that under pain of being *ipso facto* anarchist convict, we must never presume to look at it otherwise than with shut eyes? Because it was the work of our ancestors, — of ancestors, of legislators, few of whom could so much as read, and those few had nothing before them that was worth the reading. First theoretical supposition, *wisdom of barbarian ancestors.*

When from their ordinary occupation, their order of the day, the cutting of one another's throats, or those of Welchmen, Scotchmen, or Irishmen, they could steal now and then a holiday, how did they employ it? In cutting Frenchmen's throats in order to get their money: this was active virtue: — leaving Frenchmen's throats uncut, was indolence, slumber, inglorious ease. Second theoretical supposition, *virtue of barbarian ancestors.*

Thus fraught with habitual wisdom and habitual virtue, they sat down and devised; and setting before them the best ends, and pursuing those best ends by the best means, they framed — in outline at any rate — they planned and executed our Matchless Constitution — the constitution as it stands: and may it for ever stand!

Planned and executed? On what occasion? on none. At what place? at none. By whom? by nobody.

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* In the church establishment, the bad parts are —

1. Quantity and distribution of payment; — its inequality creating opposite faults — excess and deficiency. The excessive part calling men off from their duty, and, as in lotteries, tempting an excessive number of adventurers: the defect deterring men from engaging in the duty, or rendering them unable to perform it as it ought to be performed.

2. Mode of payment; — tithes, a tax on food, which discourages agricultural improvements, and occasions dissension between the minister and his parishioners.

3. Forms of admission, compelling insincerity, subversive of the basis of morality. As to purely speculative points, no matter which side a man embraces, so he be *sincere*, but highly mischievous that he should maintain even the right side (where there happens to be any) when he is *not* sincere.

At no time? Oh yes, says everything-as-it-should-be Blackstone. Oh yes, says Whig after Whig, after the charming commentator; anno Domini 1660, then it is that it was in its perfection, about fourteen years before James the Second mounted the throne with a design to govern in politics as they do in Morocco, and in religion as they do at Rome; to govern without parliament, or in spite of parliament: a state of things for which, at this same era of perfection, a preparation was made by a parliament, which being brought into as proper a state of corruption as if Lord Castlereagh had had the management of it, was kept on foot for several years together, and would have been kept a-foot till the whole system of despotism had been settled, but for the sham popish plot by which the fortunate calumny and subornation of the Whigs defeated the bigotry and tyranny of the Tories.

What, then, says the only true theory — that theory which is uniformly confirmed by all experience?

On no occasion, in no place, at no time, by no person possessing any adequate power, has any such end in view as the establishing the greatest happiness of the greatest number, been hitherto entertained: on no occasion, on the part of any such person, has there been any endeavour, any wish for any happiness other than his own and that of his own connexions, or any care about the happiness or security of the subject-many, any further than his own has been regarded as involved in it.

Among men of all classes, from the beginning of those times of which we have any account in history — among all men of all classes, an universal struggle and contention on the part of each individual for his own security and the means and instruments of his own happiness—for money, for power, for reputation natural and factitious, for constant ease, and incidental vengeance. In the course of this struggle, under favourable circumstances connected with geographical situation, this and that little security has been caught at, obtained, and retained by the subject-many, against the conjoined tyranny of the monarch and his aristocracy. No plan pursued by anybody at any time — the good established, as well as the bad remaining, the result of an universal scramble, carried on in the storm of contending passions under favour of opportunity — at each period, some advantages which former periods had lost, others, which they had not gained.

But the only regular and constant means of security being the influence exercised by the will of the people on the body which in the same breath admit themselves and deny themselves to be their agents, and that influence having against it and above it the corruptive and counter-influence of the ruling few, the servants of the monarchy and the members of the aristocracy — and the quantity of the corruptive matter by which that corruptive influence operates, being every day on the increase; hence it is, that while all names remain unchanged, the whole state of things grows every day worse and worse, and so will continue to do, till even the forms of parliament are regarded as a useless incumbrance, and pure despotism, unless arrested by radical reform, takes up the sceptre without disguise.

While the matter of waste and corruption is continually accumulating — while the *avalanche* composed of it is continually rolling on — that things should continue long in their present state seems absolutely impossible. Three states of things contend for the ultimate result: —despotic monarchy undisguised by form; representative democracy under the form of monarchy; representative democracy under its own form.

In this, as in every country, the government has been as favourable to the interests of the ruling few, and thence as unfavourable to the general interests of the subject-many,— or, in one word, as *bad* — as the subject-many have endured to see it,—have persuaded themselves to suffer it to be. No abuse has, except under a sense of necessity, been parted with—no remedy, except under the like pressure, applied. But under the influence of circumstances in a great degree peculiar to this country, at one time or another the ruling few have found themselves under the necessity of sacrificing this or that abuse — of instituting, or suffering to grow up, this or that remedy.

It is thus, that under favour of the contest between Whigs and Tories, the liberty of the press, the foundation of all other liberties, has been suffered to grow up and continue. But this liberty of the press is not the work of institution, it is not the work of law: what there is of it that exists, exists not by means but in spite, of law. It is all of it contrary to law: by law there is no more liberty of the press in England, than in Spain or Morocco. It is not the constitution of the government, it is not the force of the law; it is the weakness of the law we have to thank for it. It is not the Whigs that we have to thank for it, any more than the Tories. The Tories — that is, the supporters of monarchy — would destroy it, simply assured of their never being in a condition to have need of it: the Whigs would with equal readiness destroy it, or concur in destroying it, could they possess that same comfortable assurance. But it has never been in their power; and to that impotence is it that we are indebted for their zeal for the liberty of the press and the support they have given to the people in the exercise of

it. Without this arm they could not fight their battles; without this for a trumpet, they could not call the people to their aid.

Such corruption was not, in the head of any original framer of the constitution, the work of design: but were this said without explanation, an opinion that would naturally be supposed to be implied in it, is, that the constitution was originally in some one head, the whole, or the chief part of it, the work of design. The evil consequence of a notion pronouncing it the work of design would be, that, such a design being infinitely beyond the wisdom and virtue of any man in the present times, a planner would be looked out for in the most distant age that could be found; — thus the ancestor-wisdom fallacy would be the ruling principle, and the search would be fruitless and endless. But the non-existence of any determinate design in the formation of the constitution may be proved from *history*. The House of Commons is the characteristic and vital principle. Anno 1265, the man by whom the first *germ* was planted was Simon de Montfort, Earl of Leicester, a foreigner and a rebel. In this first call to the people, there was no better nor steadier design than that of obtaining momentary support for rebellion. The practice of seeing and hearing deputies from the lower orders before money was attempted to be taken out of their pockets, having thus sprung up, in the next reign Edward the First saw his convenience in conforming to it. From this time till Henry the Sixth's, instances in which laws were enacted by kings, sometimes without consulting Commons — sometimes without consulting them or Lords, are not worth looking out. Henry the Sixth's was the first reign in which the House of Commons had really a part in legislation: till then, they had no part in the penning of any laws; no law was penned till after they were dissolved. Here, then, so late as about 1450 (between 1422 and 1461,) the House of Commons, as a branch of the legislature, was an innovation: till then (anno 1450,) *constitution* (if the House of Commons be a part of it,) there was none. Parliament? Yes: consisting of king and lords, *legislators;* deputies of commons, *petitioners*. Even of this aristocratical parliament, the existence was precarious: indigence or weakness produced its occasional reproduction; more prudence and good fortune would have sufficed for throwing it into disuse and oblivion: like the obsolete legislative bodies of France and Spain, it would have been reduced to a possibility. All this while, and down to the time when the reassembling of parliaments was imperfectly secured by indeterminate laws, occasioned by the temporary nature of pecuniary supplies, and the constant cravings of royal paupers, had the constitution been a tree, and both Houses branches, either or both might have been lopped off, and the tree remain a tree still.*

After the bloody reigns of Henry the Eighth and Mary, and the too short reign of Edward the Sixth, comes that of Elizabeth, who openly made a merit of her wish to govern without parliament: members presuming to think for themselves, and to speak as they thought, were sent to prison for repentance. After the short parliaments produced in the times of James the First and Charles the First by profusion and distress, came the first long parliament. Where is now the constitution? Where the design? — the wisdom? The king having tried to govern without lords or commons, failed: the commons having extorted from the king's momentary despair, the act which converted them into a perpetual aristocracy, tried to govern without king or lords, and succeeded. In the time of Charles the Second, no design but the king's design of arbitrary government executed by the instrumentality of seventeen years long parliament. As yet, for the benefit of the people, no feasible design but in the seat of supreme power; and *there*, conception of any such design scarce in human nature.

The circumstance to which the cry of Matchless Constitution is in a great degree indebted for its pernicious efficiency, is — that there was a time in which the assertion contained in it was incontrovertibly true: till the American colonies threw off the yoke, and became independent states; no political state possessed of a constitution equalling it or approaching it in goodness, was anywhere to be found.

But from this its goodness in a comparative state, no well-grounded argument could at any time be afforded against any addition that could at any time be made to its intrinsic goodness. Persons happier than myself are not to be found anywhere: in this observation, supposing it true, what reason is there for my forbearing to make myself as much happier than I am at present, as I can make myself?

This pre-eminence is therefore nothing to the purpose; for of the pains taken in this way to hold it up to view, the design can be no other than to prevent it from being ever greater than it is.

But another misfortune is, that it is every day growing less and less: so that while men

* Between Henry the Third, and Henry the Sixth (anno 1265 to 1422) it is true there were frequent acts ordaining annual, and even oftener than annual parliaments.[a] Still these were but vague promises, made only by the king, with two or three petty princes: the Commons were not legislators, but petitioners: never seeing, till after enactment the acts to which their assent was recorded.

[a] See Christian on Blackstone.

keep on vaunting this spurious substitute to positive goodness, sooner or later it will vanish altogether.

The supposition always is, that it is the same one day as another. But never for two days together has this been true. Since the Revolution took place, never, for two days together, has it been the same: every day it has been worse than the preceding; for by every day, in some way or other, addition has been made to the quantity of the matter of corruption — to that matter by which the effect of the only efficient cause of good government, the influence of the people, has been lessened.

A pure despotism may continue in the same state from the beginning to the end of time: by the same names, the same things may be always signified. But a mixed monarchy, such as the English, never can continue the same: the names may continue in use for any length of time; but by the same names, the same state of things is never for two days together signified. The quantity of the matter of corruption in the hands of the monarch being every day greater and greater, the practice in the application of it to its purpose, and thence the skill with which application is made of it on the one hand, and the patience and indifference with which the application of it is witnessed, being every day greater and greater, the comparative quantity of the influence of the people, and of the security it affords, is every day growing less and less.

While the same names continue, no difference in the things signified is ever perceived, but by the very few, who having no interest in being themselves deceived, nor in deceiving others, turn their attention to the means of political improvement. Hence it was, that with a stupid indifference or acquiescence the Roman people sat still, while their constitution, a bad and confused mixture of aristocracy and democracy, was converted into a pure despotism.

With the title of representatives of the people, the people behold a set of men meeting in the House of Commons, originating the laws by which they are taxed, and concurring in all the other laws by which they are oppressed. Only in proportion as these their nominal representatives are chosen by the free suffrages of the people, and, in case of their betraying the people, are removable by them, can such representatives be of any use. But except in a small number of instances — too small to be on any one occasion soever capable of producing any visible effect — neither are these pretended representatives ever removable by them, nor have they ever been chosen by them. If, instead of a House of Commons and a House of Lords, there were two Houses of Lords and no House of Commons, the ultimate effect would be just the same. If it depended on the vote of a reflecting man, whether, instead of the present House of Commons, there should be another House of Lords, his vote would be for the affirmative: the existing delusion would be completely dissipated, and the real state of the nation be visible to all eyes; and a deal of time and trouble which is now expended in those debates, which, for the purpose of keeping on foot the delusion, are still suffered, would be saved.

As to representation, no man can even now be found so insensible to shame, as to affirm that any real representation has place: but though there is no real representation, there is, it is said, a *virtual* one; and with this, those who think it worth their while to keep up the delusion, and those who are, or act and speak as if they were deluded, are satisfied. If those who are so well satisfied with a virtual representation, which is not real, would be satisfied with a like virtual receipt of taxes on the one part, and a virtual payment of taxes on the other, all would be well. But this unfortunately is not the case: the payment is but too real, while the falsity of the only ground on which the exaction of it is so much as pretended to be justified, is matter of such incontestable verity, and such universal notoriety, that the assertion of its existence is a cruel mockery.

4. *Balance of Power.*

In general, those by whom this phrase has been used, have not known what they means by it: it has had no determinate meaning in their minds. Should any man ever find for it any determinate meaning, it will be this — that of the three branches between which, in this constitution, the aggregate powers of government are divided, it depends upon the will of each to prevent the two others from doing anything — from giving effect to any proposed measure. How, by such arrangement, evil should be produced, is easy enough to say; for of this state of things one sure effect is — that whatsoever is in the judgment of any one of them contrary to its own sinister interest, will not be done; on the other hand, notwithstanding the supposed security, whatsoever measure is by them all seen or supposed to be conducive to the aggregate interest of them all, will be carried into effect, how plainly soever it may be contrary to the universal interest of the people. No abuse, in the preservation of which they have each an interest, will ever, so long as they can help it, be removed — no improvement, in the prevention of which any one of them has an interest, will ever be made.

The fact is, that wherever on this occasion the word *balance* is employed, the sentence is mere nonsense. By the word *balance* in its original import, is meant a pair of scales. In

an arithmetical account, by an ellipsis to which, harsh as it is, custom has given its sanction, it is employed to signify that sum by which the aggregate of the sums that stand on one side of an account, exceeds the aggregate of the sums that stand on the other side of that same account. To the idea which, on the sort of occasion in question, the word *balance* is employed to bring to view, this word corresponds not in any degree in either of these senses. To accord with the sort of conception which, if any, it seems designed to convey, the word should be, not balance, but equipoise. When two bodies are so connected, that whenever the one is in motion, the other is in motion likewise, and *that* in such sort, that in proportion as one rises the other falls, and yet at the moment in question no such motion has place, the two bodies may be said to be in *equipoise;* one weighs exactly as much as the other. But of the figure of speech here in question, the object is not to present a clear view of the matter, but to prevent any such view of it from being taken: to this purpose, therefore the nonsensical expression serves better than any significant one. The ideas belonging to the subject are thrown into confusion — the mind's eye, in its endeavours to see into it is bewildered; and this is what is wanted.

It is by a series of simultaneous operations that the business of government is carried on — by a series of actions: action ceasing, the body-politic, like the body-natural, is at an end. By a balance, if anything, is meant a pair of scales with a weight in each: the scales being even, if the weights are uneven, that in which is the heaviest weight begins to move; it moves downward, and at the same time the other scale with the weight in it moves upwards. All the while this motion is going on, no equipoise has place — the two forces do not balance each other: if the wish is that they should balance each other, then into the scale which has in it the lighter weight, must be put such other weight as shall make it exactly equal to the heavier weight; or, what comes to the same thing, a correspondent weight taken from that scale which has in it the heavier weight.

The balance is now restored. The two scales hang even: neither of the two forces preponderates over the other. But with reference to the end in view, or which ought to be in view — the use to be derived from the machine — what is the consequence? — All motion is at an end.

In the case in question, instead of two, as in a common pair of scales, there are three forces, which are supposed, or said to be, antagonizing with one another. But were this all the difference, no conclusive objection to the metaphor could be derived from it; for, from one, and the same fulcrum or fixed point you might have three scales hanging with weights in them, if there were any use in it. In the expression, the image would be more complicated, but in substance it would be still the same.

Pre-eminently indeterminate, indistinct, and confused on every occasion, is the language in which, to the purpose in question, application is made to this image of a balance; and on every occasion, when thus steadily looked into, it will be found to be neither better nor worse than so much nonsense: nothing can it serve for the justification of — nothing can it serve for the explanation of.

The fallacy often assumes a more elaborate shape: — "The constitution is composed of three forces, which, antagonizing with each other, cause the business of government to be carried on in a course which is different from the course in which it would be carried on if directed solely by any one, and is that which results from the joint influence of them all, each one of them contributing in the same proportion to the production of it."

Composition and resolution of forces: this image, though not so familiar as the other, is free from the particular absurdity which attaches upon the other: but upon the whole, the matter will not be found much mended by it. In proportion as it is well conducted, the business of government is uniformly carried on in a direction tending to a certain end — the greatest happiness of the greatest number: — in proportion as they are well conducted, the operations of all the agents concerned, tend to that same end. In the case in question, here are three forces, each tending to a certain end: take any one of these forces; take the direction in which it acts; suppose that direction tending to the same exclusively legitimate end, and suppose it acting alone, undisturbed, and unopposed, the end will be obtained by it: add now another of these forces; suppose it acting exactly in the same direction, the same end will be attained with the same exactness, and attained so much the sooner: and so again, if you add the third. But that second force — if the direction in which it acts be supposed to be ever so little different from that exclusively legitimate direction in which the first force acts, the greater the difference, the further will the aggregate or compound force be from attaining the exact position of that legitimate end.

But in the case in question, how is it with the three forces? So far from their all tending to that end, the end they tend to is in each instance as opposite to that end as possible. True it is, that amongst these three several forces, that sort of relation really has place by which the sort of compromise in question is produced: a sort of direction which is not exactly the same as that which would be

taken on the supposition that any one of the three acted alone, clear of the influence of both the others. But with all this complication, what is the direction taken by the machine? Not that which carries it to the only legitimate end, but that which carries it to an end not very widely distant from the exact opposite one.

In plain language, here are two bodies of men, and one individual more powerful than the two bodies put together — say three powers — each pursuing its own interest, each interest a little different from each of the two others, and not only different from, but opposite to, that of the greatest number of the people. Of the substance of the people, each gets to itself and devours as much as it can: each of them, were it alone, would be able to get more of that substance, and accordingly would get more of that substance, than it does at present; but in its endeavours to get that more, it would find itself counteracted by the two others; each, therefore, permits the two others to get their respective shares, and thus it is that harmony is preserved.

Balance of forces. — A case there is, in which this metaphor, this image, may be employed with propriety: this is the case of international law and international relations. Supposing it attainable, what is meant by a balance of forces, or a balance of power, is a legitimate object — an object, the effectuation of which is beneficial to all the parties interested. What is that object? It is, in one word, *rest* — rest, the absence of all hostile motion, together with the absence of all coercion exercised by one of the parties over another — that rest, which is the fruit of mutual and universal independence. Here then, as between nation and nation, that rest which is the result of well-balanced forces is peace and prosperity. But on the part of the several official authorities and persons by whose operations the business of government in its several departments is carried on, is it prosperity that rest has for its consequence? No: on the contrary, of universal rest, in the forces of the body-politic as in those of the body-natural, the consequence is death. No action on the part of the officers of government, no money collected in their hands — no money, no subsistence; no subsistence, no service; — no service, everything falls to pieces, anarchy takes the place of government, government gives place to anarchy.

The metaphor of the balance, though so far from being applicable to the purpose in question, is in itself plain enough: it presents an image. The metaphor of the composition of forces is far from being so: it presents not any image. To all but the comparatively few, to whom the principles of mechanics, together with those principles of geometry that are associated with them, are thus far familiar, they present no conception at all: the conversion of the two tracts described by two bodies meeting with one another at an angle formed by the two sides of a parallelogram, into the tract described by the diagonal of the parallelogram, is an operation never performed for any purpose of ordinary life, and incapable of being performed otherwise than by some elaborate mechanism constructed for this and no other purpose.

When the metaphor here in question is employed, the three forces in question — the three powers in question, are, according to the description given of them, the power of the Monarch, the power of the House of Lords, and the power of the People. Even according to this statement, no more than as to a third part of it would the interest of the people be promoted: as to two thirds, it would be sacrificed. For example: out of every £300 raised upon the whole people, one hundred would be raised for the sake, and applied to the use of the whole people; the two other thirds, for the sake and to the use of the two confederative powers — to wit, the monarch and the House of Lords.

Not very advantageous to the majority of the people, not very eminently conducive to good government, would be this state of things; in a prodigious degree, however, more conducive would it be, than is the real state of things. For, in the respect in question, what is this real state of things? The power described as above by the name of the power of the people, is, instead of being the power of the people, the power of the monarch, and the power of the House of Lords, together with that of the rest of the aristocracy under that other name.

5. *Glorious Revolution.*

This is a Whig's cry, as often as it is a time to look bold, and make the people believe that he had rather be hanged than not stand by them. What? a revolution for the people? No: but, what is so much better, a revolution for the Whigs — a revolution of 1688. There is your revolution — the only one that should ever be thought of without horror. A revolution for discarding kings? No: only a revolution for changing them. There would be some use in changing them — there would be something to be got by it. When their forefathers of 1688 changed James for William and Mary, William got a good slice of the cake, and they got the rest among them. If, instead of being changed, kings were discarded, what would the Whigs get by it? They would get nothing; — they would lose not a little: they would lose their seats, unless they really sat and did the business they were sent to do, and then they would lose their ease.

The real uses of this revolution were the putting an end to the tyranny, political and religious, of the Stuarts: — the political, governing without parliament, and forcing the people to pay taxes without even so much as the show of consenting to them by deputies chosen by themselves: — the religious, forcing men to join in a system of religion which they believed not to be true.

But the deficiencies of the revolution were, leaving the power of governing, and in particular that of taxing, in the hands of men whose interest it was to make the amount of the taxes excessive, and to exercise misrule to a great extent in a great variety of other ways.

So far as by security given to all, and thence, by check put to the power of the crown, the particular interest of the aristocratical leaders in the revolution promised to be served, such security was established, such check was applied. But where security could not be afforded to the whole community without trenching on the power of the ruling few, there it was denied. Freedom of election, as against the despotic power of the monarch, was established; — freedom of election, as against the disguised despotism of the aristocracy, Tories and Whigs together, remained excluded.

CHAPTER IV.

ALLEGORICAL IDOLS — (*ad imaginationem.*)

Exposition.—The use of this fallacy is the securing to persons in office, respect independent of good behaviour. This is in truth only a modification of the fallacy of vague generalities, exposed in the preceding chapter. It consists in substituting for men's proper official denomination, the name of some fictitious entity, to whom, by customary language, and thence opinion, the attribute of excellence has been attached.

Examples: — 1. *Government;* for members of the governing body. 2. *The law;* for lawyers. 3 *The church;* for churchmen. The advantage is, the obtaining for them more respect than might be bestowed on the class under its proper name.

Exposure. — I. *Government.* In its proper sense, in which it designates the set of operations, it is true, and universally acknowledged, that everything valuable to man depends upon it: security against evil in all shapes, from external adversaries as well as domestic.

II. *Law:* execution of the *law.* — By this it is that men receive whatsoever protection they receive against domestic adversaries and disturbers of their peace. By *government — law — the law* — are therefore brought to view the naturalest and worthiest objects of respect and attachment within the sphere of a man's observance: and for conciseness and ornament (not to speak of deception) the corresponding fictitious entities are feigned, and represented as constantly occupied in the performance of the abovementioned all-preserving operations. As to the real persons so occupied, if they were presented in their proper character, whether collectively or individually, they would appear clothed in their real qualities, good and bad together. But, as presented by means of this contrivance, they are decked out in all their good and acceptable qualities, divested of all their bad and unacceptable ones. Under the name of the god Æsculapius, Alexander the impostor, his self-constituted high priest, received to his own use the homage and offerings addressed to his god. Acquired, as it is believed, comparatively within late years, this word *government* has obtained a latitude of import in a peculiar degree adapted to the sinister purpose here in question. From *abstract*, the signification has become, as the phrase is, *concrete.* From the system, in all its parts taken together, it has been employed to denote the whole assemblage of the individuals employed in the carrying on of the system — of the individuals who, for the time being, happen to be members of the official establishment, and of these more particularly, and even exclusively, such of them as are members of the administrative branch of that establishment. For the designation either of the branch of the system, or of the members that belong to it, the language had already furnished the word *administration.* But the word administration would not have suited the purpose of this fallacy: accordingly, by those who feel themselves to have an interest in the turning it to account, to the proper word administration, the too ample, and thence improper word *government*, has been, probably by a mixture of design and accident, commonly substituted.

This impropriety of speech being thus happily and successfully established, the fruits of it are gathered in every day. Point out an abuse — point to this or that individual deriving a profit from the abuse: up comes the cry, "You are an enemy to government!" then, with a little news in advance, "Your endeavour is to destroy government!" Thus you are a Jacobin, an anarchist, and so forth: and the greater the pains you take for causing government to fulfil, to the greatest perfection, the professed ends of its institution the greater the pains taken to persuade those who wish, or are content to be deceived, that you wish and endeavour to destroy it.

III. *Church.*—This is a word particularly well adapted to the purpose of this fallacy. To the elements of confusion shared by it with *government* and *law*, it adds divers pro-

per to itself. The significations indifferently attachable to the word *Church* are — 1. Place of worship; 2. Inferior officers engaged by government to take a leading part in the ceremonies of worship;* 3. All the people considered as worshippers; 4. The superior officers of government by whom the inferior, as above, are engaged and managed; 5. The rules and customs respecting those ceremonies.

The use of this fallacy to churchmen, is the giving and securing to them a share of coercive power; their sole public use, and even original destination, being the serving the people in the capacity of instructors — instructing them in a branch of learning, now more thoroughly learnt without than from them.† In the phrase "*church* and *state*," *churchmen* are represented as superior to all *non-churchmen*. By "*church* and *king*," churchmen are represented as superior to the king. Fox and Norfolk were struck off the the list of privy councillors for drinking "The sovereignty of the people:" the reduction would be greater, were all struck off who have ever drank "Church and king." According to Bishop Warburton's Alliance, the people in the character of the church, meeting with all themselves in the character of the state, agreed to invest the expounders of the sacred volume with a large share of the sovereignty. Against this system, the lawyers, their only rivals, were estopped from pleading its seditiousness in bar. In Catholic countries, the churchmen who compose Holy Mother Church possess one beautiful female, by whom the people are governed in the field of spiritual law, within which has been inclosed as much as possible of profane law. By Protestants, on Holy Mother Church the title of Whore of Babylon has been conferred: they recognise no Holy Mother Church. But in England, churchmen, a large portion of them, compose two *Almæ Matres Academiæ* — kind Mother Academies or Universities. By ingenuity such as this, out of "lubberly postmasters' boys" in any number, one "sweet Mrs. Anne Page" is composed, fit to be decked out in elements of amiability to any extent. The object and fruit of this ingenuity is the affording protection to all abuses and imperfections attached to this part of the official establishment. Church being so excellent a being, none but a monster can be an *enemy*, a *foe* to her. *Monster*, *i. e.* anarchist, Jacobin, leveller, &c. To every question having reform or improvement in view as to this part of the official establishment, the answer is one and the same: "You are an enemy to the church." For instance, among others, to such questions as follow: — 1. What does this part of the official establishment do, but read or give further explanation to one book, of which more explanation has been given already than the longest life would suffice to hear? 2. Does not this suppose a people incapable of being taught to read? 3. Would it not be more read if each of them, being able to read, had it constantly by him to read all through, than by their being at liberty some of them to go miles to hear small parts of it? Suppose it admitted, that by the addition of other services conducive to good morals and good government, business for offices not much inferior to the existing ecclesiastical offices might be found, then go on and ask — 1. As to the connexion between reward and service, do not the same rules apply to these as to profane offices? 2. Pay unconditioned-for service, — is it more effectual in producing service here than there? 3. *Here* more than *there*, — can a man serve in a place without being there? 4. Here, as there, is not a man's relish for the business proved the greater, the smaller the factitious reward he is content to receive for doing it? 5. The stronger such his relish, is not his service likely to be the better? 6. Over and above what, if anything, is necessary to engage him to render the service, does not every penny contribute to turn him aside to other and expensive occupations, by furnishing him with the means? 7. In Scotland, where there is less pay, is not *residence* more general, and clerical *service* more abundant and efficient?

Answer: Enemy! — and, if English-bred, Apostate!

1. In Scotland, does any evil arise from the non-existence of bishops? 2. In the House of Lords, any good? 3. Is not non-attendance there more general than even non-residence elsewhere? 4. *In judiciali*, does any bishop ever attend, who is not laid hold of after reading prayers? 5. *In legislatura*, ever, except where personal interest wears the mask of gratitude? 6. Such non-attendance, is it not felt rather as a relief than as a grievance?

Answer: "Enemy to the church!"

1. In Ireland, what is the use of Protestant priests to Catholics, who will neither hear nor see them? to whom they are known but as plunderers? 2. By such exemption from service, is not *value* of preferment increased? 3. By patrons, as by incumbents, are not bishopricks thus estimated? 4. Is it not there a maxim, that service and pay should be kept in separate hands? 5. In eyes not less religious than gracious, is not the value of religion inversely as the labour, as well as directly as the profit? 6. Is not this estimate the root of those scruples, by which oaths imposed to protect Protestantism from being oppressed, are employed in securing to it the pleasure of oppressing?

Answer: "Enemy to the church!"

* Articles 19, 20.

† *Ex. gr.* from unordained Methodists, &c. and Quakers.

CHAPTER V.

SWEEPING CLASSIFICATIONS --(*ad judicium.*)

Exposition. — The device of those who employ in the way of fallacy, sweeping classifications, is that of ascribing to an individual object (person or thing) any properties of another, only because the object in question is ranked in the class with that other, by being designated by the same name.

In its nature, this fallacy is equally applicable to undeserved eulogy as to undeserved censure; but it is more frequently applied to the purpose of censure, its efficiency being greater in that direction.

Exposure. — Example 1: *Kings — Crimes of Kings.* — In the heat of the French revolution, when the lot of Louis XVI. was standing between life and death, among the means employed for bringing about the catastrophe that ensued, was the publication of a multitude of inflammatory pamphlets, one of which had for its title "The Crimes of Kings."

Kings being men, and all men standing exposed to those temptations by which some of them are led into crimes, matter could not be wanting for a book so entitled: and if there are some crimes to the temptation of which men thus elevated stand less exposed than the inferior orders, there are other crimes, to which, perhaps, that elevation renders them but the more prone.

But of the man by whom on that occasion a book with such a title was published, the object, it is but too probable, was to compose out of it this argument: Criminals ought to be punished — kings are criminals — and Louis is a king: therefore Louis ought to be punished.

Example 2: *Catholics — Cruelties of Catholics.* — Not long ago, in the course, and for the purpose of the controversy on the question, whether that part of the community which is composed of persons of the Catholic persuasion, ought or ought not to be kept any longer in a state of degradation under the predominant sect, a book made its appearance, under the title of "Cruelties of the Catholics."

Of any such complete success, as the consigning in a body to the fate in which that Catholic king was, with so many of his nearest connexions, involved, all such British subjects as participate with him in that odious name, there could not be much hope: but whatsoever could, by the species of fallacy here in question, be done towards the promoting of it, was done by that publication. The object of it was to keep them still debarred from whatsoever relief remains yet to be administered to the oppressions under which they labour: either it had this object, or it had none.

To the complexion of this argument, and of the mind that could bring it forward, justice will not be done, unless an adequate conception be formed of the practical consequences to which, if to anything, it leads.

Of the Catholics of the present and of all future time, whatsoever be the character, the cruelties, and other enormities committed by persons who in former times were called by the same indefinitely comprehensive name, will still remain what they were. Whatsoever harsh treatment, therefore, this argument warrants the bestowing on these their namesakes at the present time, the same harsh treatment will, from the same argument, continue to receive the same justification, so long as there remains one individual who, consistently with truth, is capable of being characterized by the same name.

Be they what they may, the barbarities of the Catholics of those times had their limits: but of this abhorrer of Catholic barbarities, the barbarity has, in respect of the number of intended victims, no limits other than those of time.

Of the man who, to put an end to the cruelties of kings, did what depended upon him towards extirpating the class of kings, the barbarity, so far as regarded this object, was, comparatively speaking, confined within a very narrow range. All Europe would not have sufficed to supply his scaffold with a dozen victims. But after crushing as many millions of the vermin, whom his piety and his charity marked out for sacrifice, the zeal of the abhorrer of Catholic cruelties would have been in the condition of the tiger whom, in the plains of Southern Africa, a traveller depicted to us as lying breathless with fatigue amidst a flock of antelopes.

In the same injurious device the painter of the crimes of kings might, by a no less conclusive argument, have proved the necessity of crushing the English form of the Protestant religion, and consigning to the fate of Louis XVI. the present head of it.

By order of King James I. two men, whose misfortune it was not to be able to form, in relation to some inexplicable points of technical theology, the same conception that was entertained, or professed to be entertained, by the royal ruler and instructor of his people, were burnt alive.* George IV. not only bears in common with James I. the two different denominations—viz. Protestant of the Church of England, and King of Great Britain — but, as far as marriage can be depended on for proof of filiation, is actually of the same blood and lineage with that royal and triumphant champion of local orthodoxy.

If, indeed, in the authentic and generally received doctrines of the religion in question, there were anything that compelled its pro-

* Consult Hume, Tindal, Harris, Henry

fessors to burn or otherwise to destroy or ill-treat all or any of those that differed from them, and if by any recent overt-act an adherence to those dissocial doctrines had appeared in practice, in such case the adherence to such dissocial doctrines would afford a just ground for whatsoever measures of security were deemed necessary to guard other men from the effect of such doctrines and such practice.

But by no doctrines of their religion are Catholics compelled to burn or otherwise ill-treat those who differ from them, any more than by the doctrines of the Church of England James I. was compelled to burn those poor Anabaptists.

If from analogy any sincere and instructive use had on this occasion been intended to be derived from different countries professing the same persuasion, — in these our times a much more instructive lesson would be afforded than any that could be derived from even the same country at such different times.

If in Ireland, where three-fourths or more of the population is composed of Catholics, no ill-treatment has, within the memory of man, been bestowed by Catholics, as such, upon Protestants, as such; while in the same country so much ill-treatment has on other accounts been bestowed by each of these persuasions upon the other; it is, it may be said, because the power of doing so with impunity is not in their hands.

But in countries where the Catholic religion is the predominant religion, and in which at the same time, as in our islands, barbarity on the score of heresy was by Catholics exercised according to law, and in the countries in which the exercise of those barbarities was at those times most conspicuous,—of no such barbarities has any instance occurred for a long course of years.*

CHAPTER VI.

SHAM DISTINCTIONS — (*ad judicium.*)

Exposition.— Of the device here in view, the nature may be explained by the following direction for the use of it: —

When any existing state of things has too much evil in it to be defensible *in toto*, or proposals for amendment are too plainly necessary to be rejectible *in toto*, the evil and the good being nominally distinguished from each other by two corresponding and opposite terms, eulogistic and dyslogistic, but in such sort that, to the nominal line of distinction thus drawn, there corresponds not any determinate real difference, — declare your approbation of the good by its eulogistic name, and thus reserve to yourself the advantage of opposing it without reproach by its dyslogistic name, and so *vice versa* declare your disapprobation of the evil, &c.

Exposure.— Example 1: *Liberty and Licentiousness of the Press.* — Take for example the case of the Press.

The press (including under this denomination every instrument employed or employable for the purpose of giving diffusion to the matter of human discourse by visible signs) — the press has two distinguishable uses, — viz. moral and political: moral, consisting in whatsoever check it may be capable of opposing to misconduct in private life — political, in whatsoever check it may be capable of opposing to misconduct in public life, that is, on the part of public men — men actually employed, or aspiring to be employed, in any situation in the public service: opposing viz. by pointing on the persons to whom such misconduct is respectively imputable, a portion more or less considerable of disapprobation and consequent ill-will on the part of the public at large — a portion more or less considerable according to the nature of the case.

If to such misconduct there be no such check at all opposed, as that which it is the nature of the press to apply, the consequence is, that of such misconduct, whatsoever is not included in the prohibitions and eventual punishment provided by law, will range uncontrouled: in which case, so far as concerns the political effect of such exemption from controul, the result is power uncontroulable, arbitrary despotism, in the hands whatsoever they are, in which the powers and functions of government happen to be reposed: and, moreover, in the instance of such misconduct as is included in that system of prohibition and eventual punishment, the controul will be without effect, in so far as by delay, vexation, and expense, natural or factitious, the individual who would be led to call for the application, is prevented from making such demand.

At the same time, on the other hand, the use of the press cannot be altogether free, but that on pretence of giving indication of misconduct that has actually taken place, supposed misconduct that never did actually take place, will to this or that individual be imputed.

* Even in Spain, I have been assured, if I may depend upon an assurance given me by persons fully informed, and of the most respectable character, no instance of a capital execution for any offence against religion has occurred within these twenty-two or twenty-three years.

In the capital of Mexico, if I may believe a gentleman of distinction in our own country, by whom the capital of that kingdom was lately visited, he was by the Grand Inquisitor himself conducted into every apartment of the prison of the Inquisition, for the purpose of his being assured by ocular demonstration, of the non-existence of any person in the state of a prisoner within the walls.

In so far as the imputation thus conveyed happens to be false, the effects of the liberty in question will, so far as concerns any individual person thus unjustly accused, be of the *evil* cast, and by whomsoever they are understood so to be, the dyslogistic appellation *licentiousness* will naturally be applied.

Here then comes the dilemma — the two evils between which a choice must absolutely be made. Leave to the press its perfect liberty; along with the just imputations, which alone are the useful ones, will come, and in an unlimited proportion, unjust imputations, from which, in so far as they are unjust, evil is *liable* to arise.

But to him whose wish it really is that good morals and good government should prevail, the choice need not be so difficult as at first sight it may seem to be.

Let all just imputations be buried in utter silence,—what you are sure of is, that misconduct in every part of the field of action, moral and political, private and public, will range without controul — free from all that sort of controul which can be applied by the press, and not by anything else.

On the other hand, let all unjust imputations find, through this channel, an unobstructed course,— still, of the evil — the personal suffering threatened by such infliction — there is neither certainty, nor in general any near approach to it. Open to accusation, that same channel is not less open to defence.* He, therefore, who has truth on his side, will have on his side all that advantage which it is in the nature of truth to give.

That advantage, — is it an inconsiderable one? On the contrary supposition is founded, whatsoever is done in the reception and collection of judicial evidence — whatsoever is intended by the exercise of judicial authority, by the administration of whatsoever goes by the name of justice.

Meantime, if any arrangements there be, by which the door may be shut against unjust imputations, without incurring to an equal amount that sort of evil which is liable to result from the exclusion of just ones, so much the better.

But unless and until such arrangements shall have been devised and carried into effect, the tendency and effect of all restrictions having for their object the abridging of the liberty of the press, cannot but be evil on the whole.

To shut the door against such imputations as are either unjust or useless, leaving it at the same time open to such as are at the same time just and useful, would require a precise, a determinate, a correct and complete definition of the appellative, whatsoever it be, by which the abuse — the improper use — the supposed preponderantly pernicious use — of the press, is endeavoured to be brought to view.

To establish this definition, belongs to those, and to those alone, in whose hands the supreme power of the state is vested.

Of this appellative, no such definition has ever yet been given — of this appellative no such definition can reasonably be expected at the hands of any person so situated, since, by the establishing of such definition, their power would be curtailed, their interest prejudiced.

While this necessary definition remains unestablished, there remains with them the faculty of giving continuance and increase to the several points of abuse and misgovernment by which their interest in its several shapes is advanced.

Till that definition is given, the *licentiousness* of the press is every disclosure by which any abuse, from the practice of which they draw any advantage, is brought to light, and exposed to shame: — whatsoever disclosure it is, or is supposed to be, their interest to prevent.

The *liberty* of the press is such disclosure, and such only, from which no such inconvenience is apprehended.

No such definition can be given but at their expense: — at the expense of their arbitrary power — of their power of misconduct in the exercise of the functions of government, — at the expense of their power of misgovernment — of their power of sacrificing the public interest to their own private interest.

Should that line have ever been drawn, then it is that licentiousness may be opposed without opposing liberty: while that line remains undrawn, opposing licentiousness is opposing liberty.

Thus much being understood, in what consists the device here in question? It consists in employing the sham approbation given to the species of liberty here in question under the name of *liberty*, as a mask or cloak to the real opposition given to it under the name of *licentiousness*.

It is in the licentiousness of the press that the judge pretends to see the downfall of that government, the corruption of which he is upholding by inflicting on all within his reach those punishments which by his predecessors have been provided for the suppression of all disclosures by means of which the abuses which he profits by might be checked.

Example 2: — *Reform, temperate and intemperate.*—For the designation of the species or degree of political reform, which, by him who speaks of it, is meant to be represented as excessive or pernicious, the language affords no such single-worded appellative as

* If it by accident be not so, this constitutes a different and distinct evil, for which is required a different and distinct remedy.

in the case of *liberty*:— the liberty of the press. For making the nominal and pretended real distinction, and marking out on the object of avowed reprobation the pernicious or excessive species or degree, recourse must therefore be had to epithets or adjuncts: such, for instance, as violent, intemperate, outrageous, theoretical, speculative, and so forth.

If, with the benefit of the subterfuge afforded by any of these dyslogistic epithets, a man indulges himself in the practice of reprobating reform in terms thus vague and comprehensive, and without designating by any more particular and determinate word, the species or degree of reform to which he means to confine his reprobation, or the specific objections he may have to urge, you may in general venture to conclude it is not to any determinate species or degree that his real disapprobation and intended opposition confines itself, but that it extends itself to every species or degree of reform which, according to his expectation, would be efficient; that is, by which any of the existing abuses would find a corrective.

For, between all abuses whatsoever, there exists that connexion — between all persons who see each of them any one abuse in which an advantage results to himself, there exists in point of interest that close and sufficiently understood connexion, of which intimation has been given already. To no one abuse can correction be administered, without endangering the existence of every other.

If, then, with this inward determination not to suffer, so far as depends upon himself, the adoption of any reform which he is able to prevent, it should seem to him necessary or advisable to put on for a cover, the profession or appearance of a desire to contribute to such reform, — in pursuance of the device or fallacy here in question, he will represent that which goes by the name of reform as distinguishable into two species; one of them a fit subject for approbation, the other for disapprobation. That which he thus professes to have marked for approbation, he will accordingly, for the expression of such approbation, characterize by some adjunct of the *eulogistic* cast — such as moderate, for example, or temperate, or practical, or practicable.

To the other of these nominally distinct species, he will at the same time attach some adjunct of the *dyslogistic* cast — such as violent, intemperate, extravagant, outrageous, theoretical, speculative, and so forth.

Thus, then, in profession and to appearance, there are, in his conception of the matter, two distinct and opposite species of reform — to one of which his approbation, to the other his disapprobation, is attached. But the species to which his approbation is attached is an *empty* species, — a species in which no individual is, or is intended to be, contained.

The species to which his disapprobation is attached, is, on the contrary, a crowded species, a receptacle in which the whole contents of the *genus* — of the genus *reform* — are intended to be included.

CHAPTER VII.

POPULAR CORRUPTION — (*ad superbiam.*)

Exposition. — The instrument of deception, of which the argument here in question is composed, may be thus expressed: — The source of corruption is in the minds of the people; so rank and extensively seated is that corruption, that no political reform can ever have any effect in removing it.*

Exposure. — This fallacy consists in giving to the word *corruption*, when applied to the people, a sense altogether indeterminate — a sense in and by which all that is distinctly expressed is the disaffection of the speaker as towards the persons spoken of, imputing to them a bad moral character or cast of mind, but without any intimation given of the particular nature of it.

It is the result of a thick confusion of ideas, whether sincere, or affected for the purpose.

In the case of a parliamentary election, each elector acts as a trustee for himself and for all the other members of the community, in the exercise of the branch of political power here in question. If, by the manner in which his vote is received from him, he is precluded (as by ballot) from the possibility of promoting his own particular interest, to the prejudice of the remainder of the universal interest, — the only interest of his which he can entertain a prospect of promoting by such his vote, is his share of the universal interest: and for

* This was an argument brought forward against parliamentary reform by William Windham in the House of Commons, and by him insisted on with great emphasis. This man was among the disciples, imitators of, and co-operators with, Edmund Burke — that Edmund Burke with whom the subject-many were the swinish multitude: — swinish in nature, and apt therefore to receive the treatment which is apt to be given to swine. In private life, that is, in their dealings with those who were immediately about them — at any rate, such of them as were of their own class — many of these men, many of these haters and calumniators of mankind at large, are not unamiable; but, seduced by that sinister interest which is possessed by them in common, they encourage in one another the anti-social affection in the case where it operates upon the most extensive scale. If, while thus encouraging himself in the hating and contemning the people, a man of this cast finds himself hated by them, the fault is surely more in him than them; and, whatever it may happen to him to suffer from it, he has himself to thank for it.

doing this, he sees before him no other possible means than the contributing to place the share of power attached to the seat in question in the hands of that candidate who is likely to render most service to the universal interest.

Now, how inconsiderable soever may be in his eyes this his share in the universal interest, still it will be sufficient to turn the scale where there is nothing in the opposite scale: and, by the supposition, the emptiness of the opposite scale has been secured in the mode of election by ballot, where the secresy thereby endeavoured at is accomplished, as to so complete a certainty it may be. If, then, to continue the allusion, the value of his share in the universal interest, in his eyes, is such as to overcome the love of ease — the aversion to labour — he will repair to the place, and give his vote to that candidate who, in his eyes, is likely to do most service to the universal interest: if it be not sufficient to overcome that resisting force, he will then forbear to give his vote; and though he will do no good to the universal interest, he will do no harm to it.

Thus it is that, under an apposite system of election procedure, supposing them in the account of self-regarding prudence equal, the least benevolent set of men will, on this occasion, render as much service to the universal interest as the most benevolent: the least benevolent, if that be what is meant by the *most* corrupt; and if that is not meant, nothing which is to the purpose, nor in short anything which is determinate, is meant.

On the other hand, in so far as the system of election is so ordered, that by the manner in which he gives his vote a man is enabled to promote his own separate interest, what is sufficiently notorious is, that no ordinary portion of benevolence in the shape of public spirit will suffice to prevent the breach of trust in question from being committed.

In the case, therefore, of the subject-many, to whom exclusively it was applied, the word *corruption* has no determinate and intelligible application. But to the class of the ruling few, it has a perfectly intelligible application — application in a sense in which the truth of it is as notorious as the existence of the sun at noonday. Pretending to be all of them chosen by the subject-many,—chosen, in fact, a very small proportion of them in that manner — the rest by one another, — they act in the character of trustees for the subject-many, bound to support the interest of the subject-many: instead of so doing, being with money exacted from the subject-*many* bribed by one another acting under the ruling *one*, they act in constant breach of such their trust, serving in all things their own particular and sinister interests, at the expense and to the sacrifice of that interest of the subject-many, which, together with that of the ruling few, composes and constitutes the universal interest. *Corrupt*, *corruption*, *corruptors*, *corruptionist*, applied to conduct such as hath been just described, — the meaning given to these terms wants assuredly nothing of being sufficiently intelligible.

A circumstance that renders this fallacy in a peculiar degree insidious and dangerous, is a sort of obscure reference made by it to certain religious notions — to the doctrine of original sin as delivered in the compendium of Church of England faith, termed the 39 articles.

Into that doctrine, considered in a religious point of view, it is not necessary on this occasion to make any inquiry. The field here in question is the field of politics; and, applied to this field, the fallacy in question seeks to lay the axe to the root of all government. It applies not only to *this*, but to all other remedies against that preponderance of self-regarding over social interest and affection, which is essential to man's existence, but which, for the creation and preservation of political society, and thence for his well-being in it, requires to be checked — checked by a force formed within itself. It goes to the exclusion of all laws, and in particular of all penal laws; for if, for remedy to what is amiss, nothing is to be attempted by arrangements which, such as those relative to the principle and mode of election as applied to rulers, bring with them no punishment — no infliction, — how much less should the accomplishment of any such object be attempted by means so expensive and afflictive as those applied by penal laws!

By the employment given to this fallacy, the employer of it afforded himself a double gratification: he afforded an immediate gratification to his own anti-social pride and insolence, while he afforded to his argument a promise of efficiency, by the food it supplied to the same appetite in the breasts of his auditors, bound to him, as he saw them to be, by a community of sinister interest.

Out of the very sink of immorality was this fallacy drawn: a sentiment of hatred and contempt, of which not only all the man's fellow-countrymen were the declared, but all mankind in at least equal degree were the naturally supposable object: — "So bad are they in themselves, no matter how badly they are treated: they cannot be treated worse than they deserve: Of a bad bargain (says the proverb) make the best; of so bad a crew, let us make the best for ourselves: no mat ter what they suffer, be it what it may, they deserve it." If Nero had thought it worth his while to look out for a justification, he could not have found a more apt one than this: an argument which, while it harmonized so entirely with the worst passions of the

worst men, screened its true nature in some measure from the observation of better men, by the cloud of confusion in which it wrapped itself.

In regard to corruption and uncorruption, — or to speak less ambiguously, in regard to vice and virtue, — how then stands the plain and real truth? That in the ruling few there is most vice and corruption, because in their hands has been the power of serving their own private and sinister interest, at the expense of the universal interest: and in so doing, they have, in the design and with the effect of making instruments of one another for the accomplishment of that perpetual object, been the disseminators of vice and corruption: — That in the subject-many, there has been least of vice and corruption, because they have not been in so large a degree partakers in that sinister interest, and have thus been left free to pursue the track pointed out to them, partly by men who have found a personal interest in giving to their conduct a universally beneficial direction — partly by discerning and uncorrupted men, who, lovers of their country and mankind, have not been in the way of having that generous affection overpowered in their breasts by any particular self-regarding interest.

Nearly akin to the cry of popular corruption is language commonly used to the following effect: — "Instead of reforming others — instead of reforming your betters, instead of reforming the state, the constitution, the church, everything that is most excellent, — let each man reform himself — let him look at home; he will find there enough to do, and what is in his power, without looking abroad and aiming at what is out of his power," &c. &c.

Language to this effect may at all times be heard from anti-reformists—always, as the tone of it manifests, accompanied with an air of triumph — the triumph of superior wisdom over shallow and presumptuous arrogance.

One feature which helps to distinguish it from the cry of popular corruption, is the tacit assumption that, between the operation condemned and the operation recommended, incompatibility has place: than which, when once brought clearly to view, nothing, it will be seen, can be more groundless.

Certain it is, that if every man's time and labour is exclusively employed in the correcting of his own personal imperfections, no part of it will be employed in the endeavour to correct the imperfections and abuses which have place in the government; and thus the mass of those imperfections and abuses will go on, never diminishing, but perpetually increasing with the torments of those who suffer by them, and the comforts of those who profit by them: which is exactly what is wanted.

CHAPTER VIII.

OBSERVATIONS ON THE SEVEN PRECEDING FALLACIES.

In the seven preceding fallacies, and in others of a similar nature, the device resorted to is uniformly the same, and consists in entirely avoiding the question in debate, by substituting general and ambiguous terms in the place of clear and particular appellatives.

In other fallacies, the argument advanced is generally irrelevant, but argument of some kind they do contain. In these, argument there is none; *Sunt verba et voces prætereàque nihil.*

To find the only word that will suit his purpose, the defender of corruption is obliged to make an ascent in the scale of generalization — to soar into the region of vague generalities, till he comes to a word by the extensiveness of whose import he is enabled, so by confounding language to confound conceptions, as without general and immediate fear of detection to defend, with a chance of success, an object, of the defence of which there would, under its proper and peculiar name, be no hope.

When of two terms — viz. a generic term, and a special term included under it — the specific term alone is proper, *i. e* the proposition into the composition of which it enters, true; the generic term, if substituted to it, is ambiguous; and of the ambiguity, if the effect of it is not perceived, the consequence is error and deception.

Opposite to this *aërial* mode of contestation, is the mode already known and designated by the appellation of *close reasoning*.

In proportion as a man's mode of reasoning is close (always supposing his intention honest,) for the designation of every object which he has occasion to bring to view, he employs in preference the most particular expression that he can find — that which is best adapted to the purpose of bringing to view everything which it is its object to bring to view, as clear as possible from everything which the purpose does not require to be brought, and which in consequence it is his endeavour to avoid bringing to view.

In proportion as a man is desirous of contributing on every occasion to the welfare of the community, and at the same time skilled in the means that most directly and certainly lead to the attainment of that end, he will, on the occasion of the language employed by him in the designation of each measure, look out for that plan of nomenclature and classification by which the degree and mode of its conduciveness or repugnancy to that end may be the more easily and correctly judged of.

Thus, in regard to offences, — acts which on account of their adverseness to the general

welfare are objects meet for discouragement — for prohibition — and in case of necessity, for punishment, — not content with the employing for the designation of each such act in particular, that mode of expression by which every individual act partaking of the common nature indicated by the generic term may be brought to view, to the exclusion of every act not partaking of that common nature, he will, for the designation of the relation it bears to other offences, and of the place which it occupies in the aggregate assemblage of these obnoxious acts, find for it and assign to it some such more general and extensive appellation as shall give intimation of the *mode* in which the wound given by it to the general welfare is perceptible.

1. Offences against individuals other than a man's self, and those assignable individuals; 2. Against a man's self; 3. Against this or that particular class of the community; 4. Against the whole community without distinction.

In the case of individuals,—offences against person, against reputation, against property, against condition in life — and so on through the other classes above designated.*

For the opposite reason,—in proportion as, without regard to, and to the sacrifice of, the general welfare, a man is desirous of promoting his own personal or any other private interest, he will, on the occasion of the language employed in the designation of each measure, look out for that plan of nomenclature and classification, by which the real tendency of the measure to which he proposes to give birth or support, shall be as effectually masked as possible — rendered as difficult as possible to be comprehended and judged of.

In the English law, under the principle of arrangement—which till comparatively of late years was the only one, and which is still the predominant one—such were the groupes into which, by the classical denominations employed, they were huddled together, that by those denominations not any the slightest intimation was given of the nature and mischief of the offences respectively contained under them. Treasons, felonies unclergyable, felonies clergyable, premunires, misdemeanors.

By the four first of these five denominations, what is designated is, not the offence itself, but the treatment given to the offender in respect of it in the way of punishment: by the other denomination, not so much as even that — only that the act is treated on the footing of an offence, and on that score made punishable: it is the miscellaneous class, the contents of which are composed of all such offences as are not comprised under any of the others.

To what cause can a scheme of arrangement so incompatible with clear conception and useful instruction be ascribed?

Its creation may be traced to one source: its continuance to another. For its creation (such is its antiquity,) the weakness of the public intellect presents an adequate cause. Of treason and felony — terms imported at the Norman conquest with the rest of the nomenclature of the feudal system — the origin is lost in the darkness of primæval barbarism: religion — a perversion of the Christian religion, gave birth, after a hard and long labour, to the distinction between clergyable and unclergyable: religion, by a further perversion, gave birth to *premunires* in the reign of Edward III.

To the designs of those whose interest it is that misrule in all its shapes should be perpetuated, and thence, that useful information, by which it might be put to shame, and in time to flight, should as long as possible be excluded, nothing could be more serviceable than this primæval imbecility. Under these denominations in general, and in particular under felony, acts of any description are capable of being ranked with equal propriety, or rather with equal absence of impropriety: acts of any description whatsoever, and consequently acts altogether pure from any of those mischievous consequences from which alone any sufficient warrant for subjecting the agents to punishment can be found; and offences thus clear of every really mischievous quality have accordingly been created, and still continue in existence, in convenient abundance.

By this contrivance, the open tyranny of the lawyer-led legislator, and the covert tyranny of the law-making judge, are placed at the most perfect ease. The keenest eye cannot descry the felonies destined to be created by the touch of the sceptre upon the pattern of the old: the liveliest imagination cannot pourtray to itself the innoxious acts destined to be fashioned or swollen into felonies.

Analogous to this ancient English system — correspondent and analogous both as to the effect itself and as to its cause, is the system lately brought out by the legislators of France and their forced imitators in Germany. *Faute, contravention, délit, crime* — classes rising one above another in a climax of severity, — all of them, designative how indeterminately soever, rather of the treatment to which at the hands of the judge, the agent is subjected, than of the sort of act for which he is subjected to that treatment — much less of the ground, or reason, on which (regard being had to the quality and quantity of mischief) it is thought fit he shall be so dealt with.

Lawyer-craft, in alliance with political tyranny, may be marked out as the source of this confusion in the English case; lawyer-craft in subjection to political tyranny, in the French case.

* See *Principles of Morals and Legislation*, Ch. XVIII. Vol. I. p. 96, *et seq.*

In England, it is the interest of the man of law that the rule of action should be, and continue, in a state of as general uncertainty and incognoscibility as possible: that on condition of pronouncing on each occasion a portion of the flash language adapted to that purpose, he may, in his state of law-adviser and advocate, be master of men's purses; in his state of judge, — of purse, reputation, condition in life, and life itself, to as complete a degree, and with as little odium and suspicion as possible. This is the state of things which it always has been, and will be his interest to perpetuate: and this is the state of things which hitherto it has been in his power to continue, and which accordingly does to this day continue in existence.

In France, where the man of law is not the ally of the politician, but his slave, that which it is not the interest of the politician to keep out of the view of the subject, is — what the law *is;* — that which it is his interest to keep (nor even that in all parts) out of the view of the subject, is — what it is for the interest of the subject that the law *should be;* — what, in a word, the law ought to be.

Having brought the rule of action within a compass, the narrowness of which, in respect of the quantity of words, has never, regard being had to the amplitude of the matter, yet been equalled, the tyrant of France has by this one act of charity displayed a quantity of merit, ample enough of itself to form a covering to no inconsiderable a portion of his sins

But the exemplifications of vague generalities afforded by these systems of classification are sufficiently striking. To save the authors of the systems from ranking any one of the offences in question under a denomination which would be manifestly inapplicable to it, and from the discredit which would attach to them from such a source, — ascending to a superior height in the logical scale — in the scale of genera and species, — they provide a set of denominations so boundless in their extent, as to be capable without impropriety of including any objects whatsoever on which it might be found convenient to stamp the factitious quality desired. Noxiousness to other individuals in this or that way — noxiousness to a person himself in this or that way — noxiousness to a particular class of the community in this or that way — noxiousness to the whole community in this or that way, — these are qualities which it is not in the power of despotism to communicate to any act of any sort: but to cause such persons as it is performed by to be punished with such or such a punishment, — these are effects which, be the sort of act what it may, it is but too easy for supreme power, in whatsoever hands reposed, to annex to it.

Here, then, are so many instances where the turn of the man in power not being capable of being served, or at least so well served, by giving to an object that which is at once its most particular and most proper name, a name of more general and extensive import is employed for the purpose of favouring that deception, which by the designating of it by such its proper name, would have been dissipated, and thus giving to an exercise of power, which, if rightly denominated, would have been seen to be improper and mischievous, the chance of not appearing in such its true light.

CHAPTER IX.

ANTI-RATIONAL FALLACIES — (*ad verecundiam.*)

Exposition. — When reason is found or supposed to be in opposition to a man's interests, his study will naturally be to render the faculty itself, and whatsoever issues from it, an object of hatred and contempt.

So long as the government contains in it any sort of abuse from which the members of the government, or any of them, derive in any shape a profit, and in the continuance of which they possess a proportionable interest, reason being against them, persons so circumstanced will be in so far against reason.

Instead of reason, we might here say *thought.* Reason is a word that implies not merely the use of the faculty of thinking, but the right use of it: but sooner than fail of its object, the sarcasm and other figures of speech employed upon the occasion are directed not merely against reason, but against *thought* itself; as if there were something in the faculty of thought that rendered the exercise of it incompatible with useful and successful practice.

1. Sometimes a plan, the adoption of which would not suit the official person's interest, is without more ado pronounced a *speculative* one: and by this observation all need of rational and deliberate discussion, — such as objection to the end proposed, as not a fit one — objection to the means employed, as not being fit means, — is considered as being superseded.

To the word *speculative,* for further enforcement, are added or substituted, in a number more or less considerable, other terms, as nearly synonymous to it and to one another, as it is usual for words called *synonymous* to be; viz. *theoretical, visionary, chimerical, romantic, utopian.*

2. Sometimes a distinction is taken, and thereupon a concession made. The plan is *good* in *theory,* but it would be *bad in practice; i. e.* its being good in theory does not hinder its being bad in practice.

3. Sometimes, as if in consequence of a further progress made in the art of irrationality, the plan is pronounced to be *too good to be practicable:* and its being so good as it is, is thus represented as the very cause of its being bad in practice.

4. In short, such is the perfection at which this art is at length arrived, that the very circumstance of a plan's being susceptible of the appellation of a *plan*, has been gravely stated as a circumstance sufficient to warrant its being rejected: rejected, if not with hatred, at any rate with a sort of accompaniment, which to the million is commonly felt still more galling — with contempt.

"Looking at the House of Commons with these views," says a writer on the subject of parliamentary reform, "my object would be to find out its *chief* defects, and to attempt the remedy of these *one by one*. To propose *no system, no great project*, nothing which pretended even to the name of a *plan*, but to introduce in a *temperate* and *conciliatory* manner . . . . one or two separate bills."*

In this strain were these men proposed to be addressed, anno 1810, by Mr. Brougham: in this strain were they addressed, anno 1819, by Sir James Mackintosh, in moving for a committee on the penal laws. To give a man any chance of doing anything with them, in this same way they have ever been addressed, and must ever be addressed, till by radical reform (for it cannot be by anything less) the house shall have been purged of a class of men, of whom the most complete inaptitude in respect of every element of appropriate aptitude, is an essential characteristic. In the scale of appropriate probity—in the scale of appropriate intellectual aptitude, to find their level, a man must descend below that of the very dregs of the people. Oh what a picture is here drawn of them, and by so experienced a hand! How cutting, yet how unquestionably just, the perhaps unintended, perhaps intended satire! To avoid awakening the real terrors of some, the sham terrors of others, all consistency, all comprehensive acquaintance with the field of action, must be abjured. When idolatry in all its shapes shall have become extinct, and the words *wise ancestors* no longer an instrument of deception but a by-word, with what scorn will not ancestors such as these be looked back upon by their posterity!

Intimate as is the connexion between all these contrivances, there is however enough of distinction to render them, in this or that point of view, susceptible of a separate exposure.

* This was Brougham: the time about June 1810. Reference is made to the Government periodical called the *Satirist* (by Manners,) June 1810, No. 33, p. 570. But that wretched performance is now pretty well forgotten.

§ 1. *Abuse of the words* Speculative, Theoretical, &c.

Exposure. — On the occasion of these epithets, and the propositions of which they constitute the leading terms, what will be held up to view in the character of a fallacy, is — not the use of them, but merely the abuse.

It may be placed to the account of *abuse* as often as in a serious speech, without the allegation of any specific objection, an epithet of this class bestowed upon the measure is exhibited as containing the expression of a sufficient reason for rejecting it, by putting upon it a mark of reprobation thus contemptuous.

What is altogether out of dispute is, that many and many a measure has been proposed, to which this class of epithets, or some of them, would be justly applicable. But a man's conceptions must be wofully indistinct, or his vocabulary deplorably scanty, if, be the bad measure what it may, he cannot contrive to give intimation of what, in his view, there is bad in it, without employing an epithet, the effect of which is to hold out, as an object of contempt, the very act of thinking — the operation of *thought* itself.

The fear of theory has to a certain extent its foundation in reason. There is a general propensity in those who adopt this or that theory, to push it too far; *i. e.* to set up a general proposition which is not true until certain exceptions have been taken out of it — to set it up without any of those exceptions — to pursue it without regard to the exceptions, — and thence, *pro tanto*, in cases in which it is false, fallacious, repugnant to reason and utility.

The propensity thus to push theory too far is acknowledged to be almost universal.

But what is the just inference? Not that theoretical propositions — *i. e.* propositions of considerable extent — should from such their extent be concluded to be false *in toto;* but only, that in the particular case inquiry should be made, whether, supposing the proposition to be in the character of a general rule generally true, there may not be a case in which, to reduce it within the limits of truth, reason, and utility, an exception ought to be taken out of it.

Every man's knowledge is, in its extent, proportioned to the extent as well as number of those general propositions, of the truth of which, they being true, he has the persuasion in his own mind: in other words, the extent of these his theories comprises the extent of his knowledge.

If, indeed, his theories are false, then, in proportion as they are extensive, he is the more deeply steeped in ignorance and error.

But from the mere circumstances of its being theoretical, by these enemies to know-

ledge its falsehood is inferred as if it were a necessary consequence — with as much reason as if, from a man's speaking, it were inferred as a necessary consequence, that what he speaks must be false.

One would think, that in thinking there were something wicked or else unwise: every body feels or fancies a necessity of disclaiming it. "I am not given to speculation" — "I am no friend to theories." Speculation — theory, — what **is** it but thinking? Can a man disclaim speculation, can he disclaim theory, without disclaiming thought? If they do not mean thought, they mean nothing; for, unless it be a little more thought than ordinary, theory, speculation, mean nothing.

To escape from the imputation of meditating destruction to mankind, a man must disclaim everything that puts him above the level of a beast.

A plan proposes a wrong end — or, the end being right, proposes a wrong set of means. If this be what a man means, can he not say so? Would not what he says have somewhat more meaning — be a little more consistent with the principles of common sense, with common honesty, than saying of it that it is theoretical — that it is speculative?

§ 2. *Utopian.*

As to the epithet *utopian*, the case in which it is rightly applied seems to be that in which, in the event of the adoption of the proposed plan, felicitous effects are represented as about to take place, no causes adequate to the production of such effects being to be found in it.

In Sir Thomas More's romance, from which the epithet utopian has its origin, a felicitous state of things is announced by the very name.

Considering the age in which he lived, even without adverting to the sort of religion of which he was so honest and pertinacious an adherent, we may be sufficiently assured that the institutions spoken of by him as having been productive of this effect, had, taking them altogether, very little tendency to produce it.

Such, in general, is likely enough to be the case with the portion of political felicity exhibited in any other romance: and thus far the epithet *romantic* is likely enough, though not certain, to be found well applied to any political plan, in the conveyance of which to the notice of the public, any such vehicle is employed. Causes and effects being alike at the command of this species of poet in prose, the honour of any felicitous event is as easily ascribed to *uninfluencing circumstances*, or even to *obstacles*, as to *causes*.

If the established state of things, including the abuse which in so many shapes is interwoven in it, were anything like what the undiscriminating defenders of it represent it as being — viz. a system of perfection — in this actually established system (*real* in so far as abuse and imperfection are ascribed to it — *imaginary* in so far as exemption from such abuse and imperfection is ascribed to it) — might indeed be seen an utopia — a felicitous result, flowing from causes not having it in their nature to be productive of any such effects, but having it in their nature to be productive of contrary effects.

In every department of government, say the advocates of reform, abuses and imperfections are abundant; because the hands in which the powers of government are reposed, have, partly by their own artifice, partly by the supineness of the people, been placed in such circumstances, that abuse in every shape is a source of profit to themselves.

Under these circumstances, if any expectation were really entertained that by these hands any considerable defalcation from the aggregate mass of abuse will ever be made, — to no other expectation can the charge of utopianism be with more propriety applied: effects so produced, would be produced against the force of irresistible obstacles, as well as absolutely without a cause.

But in that same system there has all along been preserved, by the many, a faculty — and that a faculty every now and then, though much too seldom and too weakly, exercised, — of creating, and without very considerable inconvenience or danger to themselves, uneasiness, more or less considerable, to these their rulers. In the state of things thus described, there is nothing of utopianism; for it is matter of universally notorious fact; and in this faculty on the part of the many of creating uneasiness in the bosoms of the few — in this faculty on the part of those who suffer by the abuses of creating uneasiness in the bosoms of those who profit by them, — in this invaluable, and, except in America, unexampled faculty — rests the only chance, the only source of hope.

§ 3. *Good in theory, bad in practice.*

Even in the present stage of civilization, it is almost a rare case, that by reason, looking to the end in view, matters of government are determined: and the cause is, the existence of so many institutions, which being adverse to the only proper end, the greatest happiness of the greatest number, are maintained, because favourable to the interests of the ruling few. Custom, blind custom, established under the dominion of that separate and sinister interest, is the guide by which most operations have been conducted. In so far as the interest of the many has appeared to the governing few to coincide with their own separate interests, in so far it has been pursued — in so far as it has appeared incom-

patible with those interests, it has been neglected or opposed.

One consequence is, that when by accident a plan comes upon the carpet, in the formation of which the only legitimate end of government has been looked to, if the beaten track of custom has in ever so slight a degree been departed from, the practical man, the man of routine, knows not what to make of it: its goodness, if it be good—its badness, if it be bad, are alike removed out of the sphere of his observance. If it be conducive to the end, it is more than he can see; for the end is what he has not been used to look to.

In the consideration of any plan, what he has not been used to, is to consider what, in the department in question, is the proper end of every plan that can be presented, and whether the particular plan in question be conducive to that end: what he has been used to, is, to consider whether in the matter and form it be like what he has practised. If in a certain degree unlike, it throws him into a sort of perplexity. If the plan be a good one, and in the form of reasons, the points of advantage whereby it is conducive to the proper end in view have been presented,—and in such sort that he sees not any, the existence of which he feels himself able to contest, nor at the same time any disadvantages which he can present in the character of preponderant ones, — he will be afraid so far to commit himself as to pronounce it a bad one. By way of compounding the matter, and to show his candour, if he be on good terms with you, he will perhaps admit it to be good — viz. in *theory*. But this concession made, — it being admitted and undeniable that theory is one thing and practice another, he will take a distinction, and, to pay him for his concession, propose to you to admit that it is not the thing for practice; in a word, that it is good in theory, bad in practice.

That there have been plans in abundance which have been found bad in practice, and many others, which would, if tried, have proved bad in practice, is altogether out of dispute.

That of each description there have been many which in theory have appeared, and with reference to the judgment of some of the persons by whom they have been considered, have been found *plausible*, is likewise out of dispute.

What is here meant to be denied, is, that a plan, which is essentially incapable of proving good in practice, can with propriety be said to be good in theory.

Whenever, out of a number of circumstances the concurrence of all of which is necessary to the success of a plan, any one is, in the calculation of the effects expected from it, omitted, any such plan will, in proportion to the importance of the omitted circumstance, be defective in practice; and if such be the degree of importance, *bad* — upon the whole, a bad one; the disadvantageous effects of the plan not finding a compensation in the advantageous ones.

When the plan for the illumination of the streets by gas-lights was laid before the public by the person who considered himself, or gave himself out for the inventor, one of the items in the article of expense — one capital article, viz. that of the pipes, was omitted. On the supposition that the pipes might all of them have been had for nothing, and that in the plan so exhibited no other such imperfections were to be found, the plan would, to the persons engaged in the undertaking, be not merely advantageous, but advantageous in the prodigious degree therein represented. If, on the contrary, the expense of this omitted article were such as to more than countervail the alleged balance on the side of profit, then would the plan, with reference to the undertakers, prove disadvantageous upon the whole, and in one word, a bad one.

But whatever it prove to be in practice, in theory, having so important an omission in it, it cannot but be pronounced a bad one; for every plan in which, in the account of advantages and disadvantages — of profit and losses, any item is on the side of disadvantage or loss omitted, is, in proportion to the magnitude of such loss, a bad one, how advantageous soever upon trial the result may prove upon the whole.

In the line of political economy, most plans that have been adopted and employed by government for enriching the community by money given to individuals, have been bad in practice.

But if they have been bad in practice, it is because they have been bad in theory. In the account taken of profit and loss, some circumstance that has been necessary to render the plan in question advantageous upon the whole, has been omitted.

This circumstance has been the advantage, which from the money employed would have been reaped, either in the way of addition to capital by other means, or in the way of comfort by expenditure.

Of the matter of wealth, portions that by these operations were but *transferred* from hand to hand, and commonly with a loss by the way, were erroneously considered as having been *created*.

§ 4. *Too good to be practicable.*

There is one case in which, in a certain sense, a plan may be said to be too good to be practicable — and that case a very comprehensive one. It is where, without adequate inducement in the shape of personal interest, the plan requires for its accomplishment that some individual or class of individuals shall

have made a sacrifice of his or their personal interest to the interest of the whole. Where it is only on the part of some one individual, or very small number of individuals, that a sacrifice of this sort is reckoned upon, the success of the plan is not altogether without the sphere of moral possibility; because instances of a disposition of this sort, though extremely rare, are not altogether without example: by religious hopes and fears, by philanthropy, by secret ambition, such miracles have now and then been wrought. But when it is on the part of a body of men or a multitude of individuals taken at random, that any such sacrifice is reckoned upon, then it is that in speaking of the plan the term *utopian* may without impropriety be applied.

In this case, — if, neglecting the question of practicability, — on the mere consideration of the nature of the results, the production of which is aimed at by the plan, it can with propriety be termed a good one, the observation, *too good to be practicable*, cannot justly be accused of want of truth.

But it is not any such intimation that, by those in whose mouths this observation is most in use, is meant to be conveyed. The description of persons by whom chiefly, if not exclusively, it is employed, are those who, regarding a plan as being adverse to their interests, and not finding it on the ground of general utility exposed to any preponderant objection, have recourse to this objection in the character of an instrument of contempt, in the view of preventing those from looking into it, who might otherwise have been so disposed.

It is by the fear of seeing it practised, that they are drawn to speak of it as impracticable.

In the character of opposers of a plan, of the goodness of which — that is, of its conduciveness to the welfare of the whole community taken together — they are themselves persuaded, it cannot be their intention or wish to exhibit themselves: it is not, therefore, in any such property of the plan that it can be their aim to engage those on whom it depends, to look for the cause of the impracticability which they impute to it.

Under favour of such observation as may have been made of the instances in which plans — the goodness of which, supposing them carried into effect, has been beyond dispute — have failed of success, what they aim at is the producing, in superficial minds, the idea of a universal and natural connexion between extraordinary and extensive goodness and impracticability: that so often as upon the face of any plan the marks of extraordinary and extensive utility are discernible, these marks may, as it were by a signal, have the effect of inducing a man to turn aside from the plan, and, whether in the way of neglect and non-support, or in the way of active opposition, to bestow on it the same treatment that he would be justified in bestowing upon a bad one.

"Upon the face of it, it carries that air of plausibility, that, if you were not upon your guard, might engage you to bestow more or less of your attention upon it. But were you to take the trouble, you would find that, as it is with all these plans that promise so much, practicability would at last be wanting to it. To save yourself from this trouble, the wisest course you can take, is, therefore, to put the plan aside, and think no more about the matter."

There is a particular sort of grin — a grin of malicious triumph — a grin made up of malicious triumph, with a dash of concealed foreboding and trepidation at the bottom of it — that forms a natural accompaniment of this fallacy, when vented by any of the sworn defenders of abuse: and Milton, instead of cramming all his angels of the African complexion into the divinity school disputing about predestination, should have employed part of them at least in practising this grin, with the corresponding fallacy, before a looking-glass.

Proportioned to the difficulty of persuading men to regard a plan as otherwise than beneficial, supposing it carried into effect, is the need of all such arguments or phrases as present a chance of persuading them to regard it as impracticable: and according to the sort of man you have to deal with, you accompany it with the grin of triumph, or with the grimace of regret and lamentation.

There is a class of predictions, the tendency and object of which is to contribute to their own accomplishment; and in the number of them is the prediction involved in this fallacy. When objections on the ground of utility are hopeless, or have been made the most of, objections on the ground of practicability still present an additional resource: by these, men who, being convinced of the utility of the plan, are in ever so great a degree well-wishers to it, may be turned aside from it: and the best garb to assume for the purpose of the attempt, is that of one who is a well-wisher likewise.

Till the examples are before his eyes, it will not be easy for a man who has not himself made the observation, to conceive to what a pitch of audacity political improbity is capable of soaring — how completely, when an opportunity that seems favourable presents itself, the mask will sometimes be taken off — what thorough confidence there is in the complicity or in the imbecility of hearers or readers.

If to say *a good thing is a good thing* is nugatory, and, as such, foolish language — what shall we say of him who stands up boldly and says, to aim at doing good is a bad thing?

In so many words, it may be questioned whether any such thing has yet been said: but what is absolutely next to it, scarce distinguishable from it, and in substance the same thing, has actually been said over and over. To aim at perfection, has been pronounced to be utter folly or wickedness; and both or either at the extreme. To say that man (the species called *man*) has so much as a tendency to better himself, and that the range of such tendency has no certain limits, — this has been — *speculation:* propositions or observations to that effect have also been set down as a mark of wickedness. "By Priestley, an observation to this effect has somewhere or other been made: by Godwin, an observation to this effect has somewhere or other been made: by Condorcet, or some other Frenchman or Frenchmen of the class of those who, for the purpose of holding them up to execration, are called philosophers, an observation to this effect has somewhere or other been made.

"By this mark, with or without the aid of any other, these men, together with other men of the same leaven, have proved themselves the enemies of mankind: and you too, whosoever you are, if you dare to maintain the same heresy, you also are an enemy to mankind."

In vain would you reply to him, if he be an official man:—Sir, Mr. Chalmers who, like yourself, was an official man, has maintained this tendency, and written a book, which from beginning to end is a demonstration of it as clear and undeniable as Euclid's: and Mr. Chalmers is neither a madman nor an enemy to mankind.

In vain would you reply to him, if he call himself a Christian: — Sir, Jesus said to his disciples, and to you if you would be one of them, "Be ye perfect, even as our Father in heaven is perfect;" and in so doing, has not only assumed the tendency, but commanded it to be encouraged and carried to its utmost possible length.

By observations such as these, may the sort of man in question be perhaps for a moment silenced: but neither by this, nor anything, nor anybody, though one rose from the dead, would he be converted.

To various descriptions of persons, over and above those who are in the secret, a fallacy of this class is in a singular degree acceptable and conciliating: —

1. To all idle men — all haters of business; a considerable class, where a share in the sovereignty of an empire such as ours is parcelled out into portions which are private property — where electors' votes are free in appearance only, and scarcely in appearance — and where the votes that are sold for money are in fact among the freest that are to be found.

2. All ignorant men — all who, for want of due and appropriate instruction, feeling themselves incapable of judging on any question on its own merits, look out with eagerness for such commodious and reputation-saving grounds.

3. All dull and stupid men; — in whose instance, information — reading — such as has fallen to their lot, has not yet been sufficient to enable them to determine a question on its own merits.

When a train of argument — when but a single argument, is presented, that requires thought — an operation so troublesome and laborious as that which goes by the name of *thought*, — an expression of scorn levelled at the author or supposed author of this trouble, is as far as it goes, a just, howsoever scanty and inadequate, punishment for the disturbance attempted to be given to honourable repose.

Under the name of theory, &c., what is it that to men of this description is so odious? What but reference to the *end*—to that which, on that part of the field of thought and action which is in question, is, or at any rate ought to be, the end pursued, and thence, in every case, the end in view — (how often must it, and ever in vain, be repeated?)— the greatest happiness of the greatest number? But were reference made to this end — to this inflexible standard — everything almost they do — everything almost they support — would stand condemned. What, then, shall be the standard? Custom — custom: custom being their own practice, blindly imitating the practice of men in the same situations, put in motion and governed by the same sinister interests.

CHAPTER X.

PARADOXICAL ASSERTION — (*ad judicium.*)

1. *Dangerousness of the principle of utility.* 2. *Uselessness of classification.* 3. *Mischievousness of simplification.* 4. *Disinterestedness a mark of profligacy.*

Exposition. — When of any measure, practice, or principle, the utility is too far above dispute to be capable of being impeached by reasoning, a rhetorician to whose interests or views it has appeared adverse, has in some instances, in a sort of fit of desperation, made this attack upon it; taking up the word or set of words commonly employed for the designation of it, without any such attempt as that of opposing it by any specific objection, he has assailed it with some vehement note of reprobation or strain of invective, in which the mischievousness or folly of it has been taken for granted, as if it were undeniable.

Exposure is a sort of process of which the device in question is scarce susceptible: but for the purpose of exposition, an example or two may have its use.

Utility, method, simplification, reason, sin-

cerity. By a person unexperienced in the arts of political and verbal warfare, it would not readily be imagined that entities like these should, by any man laying claim to the distinguishing attribute of man, be pointed out as fit objects of hatred and contempt: yet so it is.

1. *As to Utility.*— Already has been named "a great character in a high situation," by whom the principle of utility was pronounced a *dangerous* one.* A book might be mentioned, and one of no small celebrity,† in which the same principle — the principle of utility — has been pronounced useless: — the principle itself, and consequently every investigation in which, to the purposes of legislation or common life, application is endeavoured to be made of it.

What must be acknowledged is, that to make a right and effectual use of it, requires the concurrence of those requisites which are not always found in company: — invention, discernment, patience, sincerity — each in no inconsiderable degree; while, for the pronouncing of decisions without consulting it, decisions in the *ipse dixit* style, nothing is required but boldness.

Not that, on any occasion on which it promises to suit his purpose, and he feels in himself a capacity to apply it to that purpose, the most decided scorner of it ever fails to make use of it. It is only when, if consulted, its decisions would be against him, or he feels himself awkward at consulting it, that he ever takes upon him to do without it: and to prove anything to be right or wrong, thinks it sufficient for himself to say so.

2. *Classification a bad thing — Good method a bad thing.*

On the same occasion in which a convenience was found in pronouncing the principle of utility useless, the like convenience was found in professing the like contempt for that quality in discourse which goes by the name of good method, or simply, *method*, and that sort of operation called good classification, or simply, *classification*.

When the subject a man undertakes to write upon is to a certain degree extensive — as for example, the science of morals, or that of legislation — whether what a man says be clear or not of falsehood, will depend upon the goodness of the method in which the parts of it have been cast: — 1. If, for example, snow and charcoal were both classed under the same name, and neither of them had any other, — if the question were asked, whether the thing known by that name were white or black, no inconsiderable difficulty would be found in answering it either by a yes or no. 2. And if, under favour of the identity of denomination, sugar of lead were to be used in a pudding instead of any of the sort of sugar usually applied to that purpose, practical inconveniences analogous to those which were experienced by Thornbury from eating pancake,‡ might probably be found to result from the mistake thus exemplified in the tactical branch of the art or science of life, call it which you please.

In the course of an attempt made‖ to cast the whole multitude of pernicious actions into apt classes, — as a fruit, and proof, and test

* Lord Loughborough, when Attorney-General.[a] The observation made by him in the year 1789 was reported to me presently after it was made. Not till many years after — some time, as I perceive, after what is in the text was written, was the true import perceived by me. The character in which at the time it presented itself to my view, was that of a gross absurdity: its true character was that of deep sagacity. By the principle of utility, what I understood was — that principle which states as the only justifiable end of government, the greatest happiness of the greatest number of the members of the community. At that time I still continued to take for granted (such was my simplicity) that this was the end generally aimed at, though often so widely missed. By those whose desire it was, that on each occasion that end should be attained, it could not without self-contradiction be supposed that the endeavour to attain it could seem dangerous. But Loughborough was too well acquainted with the state of government in this country (not to speak of other countries,) not to know that it is the greatest happiness of the ruling few, and not that of the greatest number, that is the end pursued on each occasion by the ruling few. What, then, was the interest which on that occasion, as on all occasions, that member of the ruling few had at heart, and thence preferably, if not exclusively, in mind? It was, of course, the interest of the ruling few. But the interest of the ruling few is, on the greatest part of the field of government, in a state of continued opposition to that of the greatest number: accordingly, a principle which, in case of competition, and to the extent of the competition, called for sacrifices to be made of the interests of the class to which he belonged, and which alone was the object of his solicitude, could not but in his eyes be a dangerous one. (*See Hist. Pref. to Fragment on Government*, Vol. I. p. 245.)

† The Edinburgh Review.

[a] *Note written August* 21, 1819: — "Great characters in high situations," a phrase employed about December 1809 by minister Percival, then Attorney-General, in calling down the vengeance of the law on I forget what alleged libeller, for using the appellation of "the Doctor" in speaking of Lord Sidmouth. By the picture it seemed to give of the character of the prosecution and of the persons who bore a part in it, it made a lasting impression on my mind.

‡ In the pancake in question, which, at a table at the Cape of Good Hope was served up to a company, of which Thornbury, better known by his travels in Japan, was one, white lead was employed instead of flour:—some recovered, and some died.

‖ In a book written anno 1780, published anno 1789, under the title of *Introduction to Morals and Legislation*.—(See Vol. I. of this collection.)

of the supposed aptitude, about a dozen propositions were mentioned as being capable of being, without any deviation from the truth of things, ascribed to the pernicious acts respectively collected together under one denomination by the names respectively assigned to the four classes to which they were referred.

On the same occasion, intimation was likewise given, that in the system of law and law terms in use for the designation of offences among English lawyers, no such fair general denomination could be found, to the contents of which an equal number, and it might perhaps have been added, any number at all, of common propositions could, without error and falsehood, be ascribed. A system of classification and nomenclature which can never be employed without confounding, at every turn, objects which, to prevent practical and painful accidents, require to be distinguished, must, by every man who has not a decided interest in maintaining the contrary, be acknowledged to be very ill adapted to those which are, or at least which ought to be, its purposes.

Here, then, was an intimation given, that the whole system of English penal law is in an extreme degree ill adapted to what ought to be the purposes of every system of law; and an implied invitation to those, if any such there were, who being conversant in the subject of law, had any desire to see it well adapted to its professed purposes, to show that the system was not, in respect of the points indicated, a bad one—the radically bad one it was there represented to be,—or else to take measures for making it better. But it being the interest of every one who is most conversant with this subject, that the whole system, instead of being as good as it can be made, should be as bad as those who live under it will endure to see it, the invitation could not in either branch be accepted.

In any other branch of science that can be named—medicine, chemistry, natural history in all its branches, the progress made in every other respect is acknowledged to be commensurate to, and at once effect and cause, in relation to the progress made in the art of classification: nor in any one of those branches of science, would it perhaps be easy to find a single individual by whom the operation of classification would be spoken of as anything below the highest rank in the order of importance. Why this difference? Because in any one of these branches of science there is scarce an individual to whose interest the advancement of the science is opposed: whereas among the professors of the law there exists not an individual to whose interest the advancement of the art of legislation is not opposed—is not either immediately detrimental or ultimately dangerous.

3. *Simplification.*

By the opposite vice, *complication*, every evil opposite to the ends of justice,—viz. uncertainty of the law itself, unnecessary delay, expense, and vexation, in respect of the execution — is either produced or aggravated.* Consequently, to every one by whom any wish is entertained of seeing the mass of these evils reduced, a fervent desire is entertained of seeing the virtue of simplification infused into the system of law and judicial procedure. On an occasion that took place not long ago, if the account of the debates can be trusted, a gentleman was found resolute and frank enough to stand up and rank this virtue,—if after that, such it may be called — among the worst of vices: the use of it was evidence of Jacobinism — evidence of the circumstantial kind indeed, but sufficiently conclusive.

If, on a declaration to that effect, any sentiment of disapprobation were visible in the language or deportment of that Honourable House, none such are, at least, recorded: and if none such really were perceptible, this circumstance alone might afford no inconsiderable ground for the desire expressed by some, of seeing the character of that Honourable House undergo a thorough change.

4. *Disinterestedness a mark of profligacy.*

In his pamphlet on his Official Economy Bill, to give up official emolument is by Edmund Burke pronounced, in so many words, to be "a mark of the basest profligacy."

On somewhat more defensible grounds might this position itself be pronounced as strong a mark as ever was exhibited, or ever could be exhibited, of the most shameless profligacy.

An assumption contained in it, besides others too numerous to admit of their being detailed here, is — that in the eyes of man there is nothing that has any value — nothing that is capable of actuating and giving direction to his conduct, but the matter of wealth: that the love of reputation and the love of power are themselves, both of them, without efficient power over the human heart.

So opposite is this position of his to the truth, that the less the quantity of money which, in return for his engagement to render official service, a man, not palpably unfit for the business of it, is content to accept, the stronger is the proof, the presumptive evidence thereby afforded, of his aptitude in all points with relation to the business of that office: since it is a proof of his relish for the business — of the pleasure he anticipates from the performance of it.†

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* See *Scotch Reform*, Vol. V. *Delay and Complication Tables.*

† See Bentham par Dumont. *Théorie des Peines et des Récompenses: (Rationale of Punishment*, Vol. I. p. 388, and *Rationale of Reward, antea*, p. 189, *et seq.)* and *Defences of*

Blinded by his rage, in this his frantic exclamation, wrung from him by the unquenched thirst for lucre, — this madman, than whom none perhaps was ever more mischievous — this incendiary, who contributed so much more than any other to light up the flames of that war, under the miseries occasioned by which the nation is still groaning, — poured forth the reproach of "the basest profligacy" on the heads of thousands, before whom, had he known who they were, he would have been ready to bow the knee. Not to mention the whole magistracy of the empire, whose office is that of justice of the peace, — among other persons before whom he was in the habit of prostrating himself, of the verbal filth he thus casts around him, one large mass falls upon the head of the Marquess Camden, and from his rebounds upon those other official heads, from which the surrender made of the vast mass of official emolument drew forth the stream of eulogium which the documents of the day present us with.

5. How to turn this fallacy to account.

To let off a paradox of this sort with any chance of success, you must not be anything less than the leader of a party. For if you are, instead of gaping and staring at you, men will but laugh at you, or think of something else without so much as laughing at you; because there is no laughing at anything without thinking of it.

Moreover, a thing of this sort succeeds much better in a speech, than in a book or pamphlet — and that for several reasons.

The use of a speech is to carry the measure of the moment; and if the measure be but carried, no matter for the means. The measure being carried, the paradox is seen to be no less absurd and mischievous than it is strange: no matter — the measure is carried: war is declared, or a negotiation for peace broken off. Peace you will have some time or other, but in the meantime the paradox has had its effect. A law has passed; and that law an absurd and mischievous one: some day or other, the mischief may receive a remedy; but that day may not arrive these two or three hundred years.*

In a speech, too, it is all profit — no loss: your point may be gained, or not gained; your reputation remains where it was. It is your speech, or not your speech, whichever is most convenient. To A, who under the notion of its being yours, admires it, it *is* your speech; to B, who, because it is yours, or because it is an absurd and mischievous one, spurns at it, it is *not* your speech. If the words of your paradox are ambiguous, as they will be if they are well and happly chosen, — susceptible of two senses, an innoxious and a noxious one — this is exactly what is wanted. *A*, who on your credit is ready to take it, and to adopt it in the noxious one which suits your purpose, is suffered silently to take it in that noxious one: but if *B*, taking it in the noxious one, attacks you and pushes you too hard, then some adherent of yours (not you yourself, for it would be weak indeed for you to appear in the matter,) some adherent of yours brings out the innocent sense, vows and swears it was *that* meaning that was yours, and belabours poor B with a charge of calumny.

If in the choice of your expression you have been negligent or unfortunate, so that no more than one sense, and that one indefensible, can with any colour of reason be ascribed to it, you thus lose part of your advantage. But still no harm can happen to you: you disavow — that is, your adherent for you disavows — the very words: — and thus everything is as it should be.

Thus it is that from speeches — spoken and unminuted speeches — you derive much the same sort of advantage as is derived from that sort of sham law (which, in so far as it is made by anybody, is made by judges, and is called common or unwritten law) by lawyers: thundering all the while the charge of insincerity or folly in all who have the assurance to ascribe to it either a different word or a different meaning. To the supposed speech, as to the supposed law, they give what words they please, and then to those words they give what meaning they please. The law, indeed, neither has, nor ever had, any determinate form of words belonging to it; whereas the speech could not have been spoken, unless it had had a set, and that a complete one, of determinate words belonging to it. But in the speech — the words never having been committed to writing, or if they have been, evidence of their being the same words not being producible, — the speech-maker is as safe as if he had never uttered any one of those words.

In the intellectual weakness of those on whom, in this form, imposition is endeavoured to be practised — in this degrading weakness, and in the state of servitude in which they are accordingly held by the shackles of authority,† may be seen the cause of that success, and thence of the effrontery and insolence which this species of imposition manifests. In proportion as intellect is weaker and weaker, reason has less and less to hold upon it; au-

Economy against Edmund Burke and George Rose, Vol. V. p. 278, *et seq.*

* Till lately, the country has suffered in a variety of ways by the law made in the reign of Elizabeth to prevent good workmanship: the effect is felt; the cause, men cannot bear to look at.

† See *Ad Verecundiam*, Part I. *Fallacies of Authority.*

thority, fortified by the appearance, real or fallacious, of strong persuasion, more and more.

It is in this way that, strange as at first mention it cannot but appear — it is in this way — and when addressed to minds of such a texture, the more flagrant and outrageous the absurdity, the stronger its persuasive force. Why? Because, without the strongest ground, a persuasion — so strong a persuasion — of the truth of a proposition, at first sight at least so adverse to truth, it is taken for granted, could not have been formed

When the terrors of which religion is the source, are the instruments employed for inculcating it, the strength of the persuasion thus inspired presents little cause for wonder. In the intensity of the exertion made for the purpose of believing — the greater the difficulty, the greater is, in case of success, the merit. Hence that most magnanimous of all conclusions, *credo quia impossibile est.* Higher than this, the force of faith — the force, and consequently the merit — cannot go: by this one bound, the pinnacle is attained; and whatsoever reward Omnipotence has in store for service of this complexion, is placed out of the reach of failure.

Be the absurdity ever so flagrant — the nature of man considered, and how absolute the dominion which is exercised over him by the passions of fear and hope — be the absurdity ever so flagrant, cause of just wonder can never be afforded by any acceptance which it receives, with the support afforded to it by the most irresistible of the passions:

The understanding is not the source — reason is of itself no spring of action: the understanding is but an instrument in the hand of the will: it is by hopes and fears that the *end* of action is determined; — all that reason does, is to find and determine upon the *means:*

But where, at the mere suggestion of a set of men with gowns of a certain form on their backs — where at their mere suggestion (unsupported by any motive of a nature to act on the will), we see men living and acting under the persuasion, that in the vice of lying there is virtue to metamorphose into justice the crime of usurpation; — here, it is not the will that is confounded and overwhelmed: it is the understanding that is deluded.*

CHAPTER XI.

NON-CAUSA PRO CAUSA: OR, CAUSE AND OBSTACLE CONFOUNDED — (*ad judicium.*)

Exposition. — When in a system which has good points in it, you have a set of abuses, or any of them, to defend, — after a general eulogium bestowed on the system, or an indication more or less explicit of the good effects the existence of which is out of dispute, take the abuses you have to defend, either separately or collectively (collectively is the safest course,) and to them ascribe the credit of having given birth to the good effects.

Cùm hoc, ergò propter hoc.

In every political system which is of long standing, and which, not having been produced, any considerable part of it, in prosecution of any comprehensive design, good or bad, but piecemeal at different and distant times, according to the casual and temporary predominance of conflicting interests — whatsoever may be the good or the bad points in the state of things which at any given time constitutes the result of it, among the incidents which may be observed as having place in it, some, upon proper scrutiny and proper distinction made, may be seen to have operated in the character of effective or promotive causes — others, in the character of obstacles or preventives — others, to have been in relation to them, in the character of immaterial incidents, or inoperative circumstances.

In such a system, whatsoever are the abuses or other imperfections in it, and whatsoever are the prosperous results observable in it, these prosperous results will have found, in the abuses and imperfections, not so many efficient or promotive causes, but so many obstacles or preventives.

Meantime, if so you can order matters, that instead of being recognised as having operated in the character of obstacles, the abuses in question shall be believed to have operated in the character of efficient or promotive causes, nothing can contribute more powerfully to the effect which it is your endeavour to produce.

If you cannot so far succeed as to cause the prosperous results in question to be referred to the abuses by which they have been obstructed and retarded, the next thing you are to endeavour at is, to cause them to be

* To form a ground for decision, a judge asserts, as true, some fact which to his knowledge is not true—some fact, for the assertion of which, if, in the station of a witness, and without having for his protection the power of a judge, a man were to venture the assertion of, he would by this same judge be punished with imprisonment and infamy. To screen it from the abhorrence due to it, — this lie, exceeding in wickedness the most wicked of the assertions commonly brought into view under that name, is decked up in the same appellation, *fiction*, which is employed in bringing to view the innoxious and amusing pictures of ideal scenes for which we are indebted to the poetic genius. What you are thus doing with the lie in your mouth, — had you power to do it without the lie? — your lie is a foolish one. Have you no such power? — it is a flagitious one. In this mire may be seen laid the principal part of the foundation of English common law.

ascribed to some inoperative circumstance or circumstances, having in appearance some connexion or other — the nearer the better — with the abuses.

At any rate, you will, as far as depends upon you, cause the prosperous circumstances in question to be referred to any causes rather than the real ones: for in proportion as it becomes manifest of what causes they are the results, it will become manifest of what other circumstances they have not been the results: whereupon, no sooner is any one of the abuses you have to defend, considered in this point of view, than a question will be apt to occur. — Well, and this? — what has been the use of this? To which no answer being found, the consequence is such as need not be mentioned.

Real knowledge being among the number of your most formidable adversaries, your endeavour must of course be to obstruct its advancement and propagation as effectually as possible.

Real knowledge depends in a great degree on the being able, on each occasion, to distinguish from each other, causes, obstacles, and uninfluencing circumstances; — these, therefore, it must on every occasion be your study to confound as effectually as possible.

Exposure.—Example 1—*Good Government: Obstacle represented as a cause, — the influence of the Crown.*

If the superiority of the constitution of the English limited monarchy, as compared with all absolute or less limited monarchies, be in England a point undisputed, and regarded as indisputable, and the characteristic by which that limited monarchy is distinguished from all absolute and less limited monarchies, is, the influence, the superior influence of the mass of the people — the influence exercised by the will of the nominees of the people on the wills of the nominees of the king, and thence on the conduct of the king himself, — a circumstance which, in so far as it operates, diminishes the efficiency of this influence, and on many, if not most occasions, may be seen to destroy that efficiency altogether, cannot with propriety be numbered among the causes of that superiority, but must, on the contrary, be placed to the account of the obstacles that obstructed it.

In point of fact, the members of the House of Commons — some really, all in supposition, nominees of the mass of the people — act, as to the nominees of the king, viz. (the members of the executive department) with the authority of judges, — viz. to the purpose of causing *punishment* to be inflicted under the name of punishment, in case of special delinquency, not without the concurrence of the House of Lords — but, to the purpose of causing *removal*, without any such concurrence.

In so far as over the will of the nominees of the people as above mentioned, acting in their above-mentioned character of judges, an efficient influence is exercised by the king or his nominees, the efficiency of this judicial authority is destroyed; the nominees of the king, in the exercise of their respective functions, committing any enormities at pleasure; and thereupon, in the character, though without the name of judges, absolving themselves, and, if such be their pleasure, praising themselves for what they have done.

In this case, the fallacy consists in representing, defending, and supporting, in the character of an indispensable cause of the acknowledged prosperous results, the sinister and corruptive influence in question — a circumstance which, so far from being in any degree a promotive cause, is an obstacle.

In what way it operates in the character of an obstructive and destructive circumstance, has already been shown above: in what way, with relation to the same effect, it can operate as a cause, has never been so much as attempted to be shown — it has been on every occasion taken for granted, and this on no other ground than that of its being a concomitant circumstance.

Example 2 — *Effect, Good Government: Obstacle represented as a cause, — station of the Bishops in the House of Lords.*

To good government, neither in the situation of a bishop, nor in any other situation, can a man be contributory any further than as he takes a part in it.

In that department of government which is carried on in the House of Lords, a man cannot bear a part any further than as he takes a part in the debates carried on there, or at least attends and gives his vote.

But of the whole body of bishops, including, since the Union, those from Ireland, a small part, upon an average scarce so many as a tenth, are seen to attend and give their votes: and as for speaking — when any instance of it happens to take place, it sets men a-staring and talking as if it were a phenomenon.

How comes it that the number of those who vote, and especially of those who speak, is so small? Because a general feeling exists, that to that class temporal occupations and politics are not suitable occupations.

And why not suitable?

1. Because, in that war of personalities, in which, in a large proportion, the debates in that as well as in the other House consist, a man of this class is in a peculiar degree vulnerable. The Apostles — did they bear any part in, had they any seat in, the Roman senate, or so much as in the common-council

of the city of Jerusalem? Was it Peter, was it James, was it John — was it not Dives, that used to clothe himself in purple and fine linen? Walking from place to place to preach, comprised their occupations. If yours were the same, would you not be rather more like them than you are?

2. Because there is a general feeling, though not expressed in words, from a sort of decency and compassion, that a legislative assembly is not a fit place for a man who is not at liberty to speak what he thinks; and who, should he be bold enough to bring to view any one of the plainest dictates of political utility, might be put to silence and confounded by reference to this or that one of the thirty-nine Articles, or by this or that text of Scripture, out of a Testament Old or New.

So many things of which, however improbable, he is bound to profess his belief.

So many things which, however indefensible by reason, he would be bound, were he to open his mouth, to defend.

Matter of duty to him to be — matter of infamy not to be — steeled against conviction.

So many vulnerable parts with which he is embarrassed, and with which an antagonist of his is not embarrassed.

So many chains with which he is shackled, and with which an antagonist of his is not shackled.

A man, whose misfortune should it be to hear a word or two of reason, it would be his duty not to listen to it.

To a man thus circumstanced, to talk reason would have something ungenerous in it and indecorous: it would be as if a man should set about talking indecently to his daughter or his wife.

In vain would they answer, what has been so often answered, that neither Jesus nor his Apostles ever meant what they said — that everything is to be explained and explained away. By answers of this sort, those and those alone would be satisfied, whose satisfaction with everything that is established is immoveable, and not susceptible of experiencing diminution from any objections, or increase from any answers.

Example 3. — *Effect, Useful national learning: Obstacle stated as a cause,—system of education pursued in Church-of-England Universities.*

On the subject of learning, to the question whether, with relation to it, the universities might with more propriety be considered as causes or as obstacles, much need not here be said, after what has been said on the subject by the Reverend Vicesimus Knox, and of late by the *Edinburgh Review*.

If these fragments, with the exception of the scurrilous parts of the Review, were put together and made into a book, a most instructive addition to it might be made by a history of the treatment experienced from this quarter by the inventions of the Quaker Lancaster. In the age of academical and right reverend orthodoxy, learning, it would there be seen, is, even to the very first rudiments of it, an object of terror and hatred.

Of this Quaker, though he undertook not to attempt to make converts, what is certain is, that no school would, under his management, have been a school of perjury: and since, in so far as by his means the elementary parts of knowledge made their way among the people, intellectual light would take place of intellectual darkness, he experienced the hostility that might so naturally have been expected from those who love darkness better than light; to wit, for a reason which may be seen in that book, the knowledge of which it was his object to diffuse, as it was theirs to confine and stifle it.

In virtue and knowledge—in every feature of felicity, the empire of Montezuma outshines, as everybody knows, all the surrounding states, even the commonwealth of Tlascala not excepted.

Where (said an inquirer once, to the high priest of the temple of Vitzlipultzli,) where is it that we are to look for the true cause of so glorious a pre-eminence? "Look for it!" answered the holy pontiff— "where shouldst thou look for it, blind sceptic, but in the copiousness of the streams in which the sweet and precious blood of innocents flows daily down the altars of the great God?"

"Yes," answered in full convocation and full chorus the archbishops, bishops, deans, canons, and prebends of the religion of Vitzlipultzli: — "Yes," answered in semi-chorus the vice-chancellor, with all the doctors, both the proctors and masters regent and non-regent of the as yet uncatholicized university of Mexico: — "Yes, in the copiousness of the streams in which the sweet and precious blood of innocents flows daily down the altars of the great God."

Example 4.—*Effect, National virtue: Obstacle represented as a cause, — opulence of the clergy.*

In several former works it has been shown,* that, be the effect what it may, — in so far as money, or in any other shape, the matter of reward, is, in the character of an efficient cause, employed in the view or under the notion of promoting it, — what degree of efficiency shall attend in such case the use made of the instrument, depends not so much

* *Rationale of Punishment, Do. of Reward; Defence of Economy against Burke*, and *Do. against Rose, ut supra; Church-of-Englandism Examined*, 1818.

upon its magnitude as upon the manner in which, and the skill with which, it is applied; and in particular, that in so far as that instrument is composed of public money, it is no less possible, and in some cases much more frequent, so to apply it, that the production of that effect shall, instead of being promoted, be prevented: that when, as for working, a man is paid alike whether he does work or whether he does none, to expect work from him is impossible, and to pretend to expect it, mere mockery: that after engaging to render an habitual course of service (for the rendering of which no extraordinary degree of talent or alacrity is necessary,) a fit person has received that which is necessary to obtain his free engagement for the rendering it, every penny added has no other tendency than to afford him means and incentives to relinquish his duties for whatever other occupations are more suitable to his taste.

Now if this be true of all men, it is true of every man: and it is not a man's being called prebend, canon, dean, bishop, or even archbishop, that will in his case, or in any other person's case, make it false.

It is a proposition that, be it ever so true, is not evident, but requires argument deduced from experience to render it so, that by such service as is rendered by the English clergy, virtue is in any degree promoted.

It is a proposition that, be it to a certain extent ever so true, is to a certain extent notoriously not true, that to the procurement of such service, money from any source is necessary. For without a particle of money passing from hand to hand, service of this sort is rendered by men one towards another, viz. among the people called Quakers: and if for the exhibiting to view the comparative degrees of efficiency with which service of this sort is rendered — work of this sort done — who is there that will take upon him to deny that the highest degree of the scale would be found occupied by the people called Quakers, or disputed with them by the people called Methodists — while the very lowest would be recognised as being occupied without dispute by the members sacred or profane of the established and most opulently endowed Church of England?

It is another proposition that still remains to be proved, that, admitting that for the procurement of this service — to the whole extent in which for the production of virtue it is wanted — money is necessary; it is also necessary, that for the raising of the necessary quantity, money should, by the power of government, be forced out of the pockets of unwilling contributors.

CHAPTER XII.

PARTIALITY-PREACHER'S ARGUMENT — (*ad judicium.*)

"From the abuse, argue not against the use."

Exposition. — From abuse it is an error (it has been said) to argue against use.

The proposition is an absurd one, make the best of it: but the degree of absurdity will depend upon the turn that may be given to the sentence.

Whichsoever be the turn given to it, the plain and undeniable truth of the case, as between use and abuse, will alike serve for the exposure of it.

Be the institution what it may, whatsoever good effects there are that have resulted from it, these constitute, as far as experience goes, the *use* of it: whatsoever ill effects have resulted from it, these, in so far at least as they have been the object of foresight and the result of intention, constitute the *abuse* of it.

Thus as to past results: and the same observation applies to expected future ones.

Exposure. — Now then come the fallacies to the propagation of which it may and must have been directed: —

1. In taking an account of the effects of an institution, you ought to set down all the good effects, and omit all the bad ones.

This is one of the purposes to which it is capable of being applied: this needs not much to be said of it.

2. In taking an account of the effects of an institution good and bad, you ought not to argue against it on the supposition that the sum of the bad ones is greater than the sum of the good ones, merely from the circumstance, that among all its effects taken together, there are some that belong to the bad side of the account.

In this latter sense, such is the character of the maxim, that nothing can be said against the truth of it. As an instruction, it is too obvious to be of any use: in the way of warning, it cannot by possibility do any harm; nor is it altogether out of the sphere of possibility, that in this or that instance it may have its use.

Applied to a man's pecuniary affairs, it amounts to this; viz. Conclude not that a man has no property because he has some debts.

CHAPTER XIII.

THE END JUSTIFIES THE MEANS — (*ad judicium.*)

IN this case, surely, if in any, exposition is of itself exposure.

The insertion of this article in the list of fallacies, was suggested by the use made of it in the Courier newspaper of the 27th of

August 1819, as reported and commented upon in the Morning Chronicle of the 28th.*

The end justifies the means. Yes: but on three conditions, any of which failing, no such justification has place: —

1. One is, that the end be good.

2. That the means chosen be either purely good — or if evil, having less evil in them than on a balance there is of real good in the end.

3. That they have more of good in them, or less of evil, as the case may be, than any others, by the employment of which the end might have been attained.

Laying out of the case these restrictions, note the absurdities that would follow.

Acquisition of a penny loaf is the end I aim at. The goodness of it is indisputable. If, by the goodness of the end, any means employed in the attainment of it are justified, instead of a penny, I may give a pound for it: thus stands the justification on the ground of prudence. Or, instead of giving a penny for it, I may cut the baker's throat, and thus get it for nothing: and thus stands the justification on the ground of benevolence and beneficence.

In politics, what is the use of this fallacy? In the mouth of one whose station is among the INS, it will serve for whatsoever cruelties those by whom power is exercised may at any time find a pleasure in committing on those over whom power is exercised, for the purpose of confirming themselves in the power of committing more such cruelties.

The INS, as such, have the power to commit atrocities; and that power having sinister interest for its spur, is never suffered to be idle. For the use of this fallacy, in so far as it can be worth their while to employ a cloak, they have therefore a continual demand.

The OUTS, acting under the impulse of the same spur, sharpened by continual privation and continually repeated disappointment, have on their part a still more urgent demand for the same fallacy, though the opportunities of making application of it but rarely present themselves to their hands.

The oracular party adage, invented by the Whigs — Not men but measures — or, Not measures but men — (for according as you complete the sentence, you may word it either way,) — this bold but slippery instrument of fallacy has manifest alliance with the present. Seating in office fit men, being the end, every thing depending upon that end, and the men in question being the only ones by which it can be attained, no means can be imagined, which by such an end may not be justified.

* The Courier newspaper is, in the other public prints, perpetually spoken of as enjoying the favour of the monarch of the day. I have all all along been upon the watch to see whether a denial in any shape of that assertion would be given: I have never been able to hear of any such thing. The fact admitted, a conclusion which can scarcely be refused is, that the principles manifested in that paper are the principles entertained and acted upon by that royal arbiter of our fate, in whose disposal the lives and fortunes of about twenty millions or thereabout in the three kingdoms, and sixty millions in Asia, are placed. Without deigning to wait for and receive, or if received, to have regard to the evidence on the other side, at the solicitation of Lord Sidmouth, Secretary of State, the Prince Regent, by one letter dated August 1819, bestows his approbation upon the conduct maintained by the Manchester magistrates, on the occasion of the slaughter committed by their officers — by the armed yeomanry — on an unarmed multitude: and by another, dated the same month, upon Sir John Bing, the general commander of the regulars, for the support given by him to it. What shall we say of this? Let prudence give the answer. The secretary is worthy to serve such a sovereign: the sovereign is worthy to be served by such a secretary. Every stroke he adds to his own portrait, the faithful servant adds to that of his royal patron and protector. A complete portrait, thus formed by lines copied from the Courier, would constitute a most instructive and interesting piece.

CHAPTER XIV.

OPPOSER-GENERAL'S JUSTIFICATION: — NOT MEASURES BUT MEN; OR, NOT MEN BUT MEASURES — (*ad invidiam.*)

ACCORDING to the notions commonly entertained of moral duty under the head of probity, and in particular under the head of that branch of probity which consists in sincerity, whatsoever be the nature and extent of the business in question, private or public, it is not right for a man to argue against his own opinion; — when his opinion is so and so, to profess it to be the reverse, and in so doing, to bend the force of his mind to the purpose of causing others to embrace the opinion thus opposite to his real one.

That, in particular, if, being a member of the House of Commons, and in opposition, a measure, which to him seems a proper one, is brought on the carpet on the ministerial side, it is not right that he should declare it to be in his opinion pernicious, and use his endeavours to have it thought so, and treated as such by the House; and so again, if, being on that same side, a measure such as to him appears pernicious, is brought on the carpet on the side of opposition, it is not right that he should declare it to be in his opinion beneficial and fit to be adopted, and accordingly use his endeavours to make it generally thought so, and as such adopted by the House.

An aphorism, said to have been a favourite one with the late Mr. Charles Fox, is the proposition at the head of this chapter.

Not men but measures! or, Not measures but men! — are the two forms, in either of which, according as the ellipsis is filled up, the aphorism may be couched.

Not measures but men! is the more simple expression of the two, it being in that form that the aphorism is marked out for approbation: reprobation being the sentiment attached to its opposite, *Not men but measures!*

If you look to speeches, then comes the constant, and constantly interminable question — what were the words in the speeches? The words are in that case on each occasion genuine or spurious, the interpretation correct or incorrect, according as it suits the purpose of him who is speaking of it, and more particularly of him who spoke it, that it should be.

But on one occasion we have the aphorism from the pen of Charles Fox himself: and then, if applied to the question of sincerity or insincerity, as above, it is found to have no direct bearing on it.

"*Are to be attended to,*" are the words employed on this occasion to complete the proposition. "How vain, how idle, how presumptuous," says the declaimer in his attempt to put on the historian, "is the opinion that laws can do everything! and how weak and pernicious the maxim founded upon it, that measures not men, are to be attended to!"

Weak enough, as thus expressed, it must be confessed; and abundantly too weak to be by a statesman considered as worth noticing, even by so vague and ungrounded a note of reprobation. As if any one ever thought of denying that both ought to be "*attended to!*" and as if, even in a debating club, words so vague and unmeaning as "*attended to*" were a fit subject of debate.

What must be confessed is, that to a man who wishes well to his country, and sees a set of men who in his opinion are a bad set, conducting the affairs of it, few things are more provoking than by this or that comparatively unimportant, but so far as it goes beneficial measure, to see them obtain a degree of reputation, of which one effect may be to confirm them in their seat.

But what seems not to have been sufficiently "*attended to*" is, that it is by the badness of their measures, that the only warrant for giving to the men the appellation of bad men, can be grounded: that if they are really the bad men they are supposed to be, have a little patience, and they will come out with some bad measure, against which, it being by the supposition bad, and by yourself looked upon as such, you may, without prejudice to your sincerity, point your attacks: and if no such bad measure ever came from them, the imputation of their being bad men is rather premature.

Distressing indeed to a man of real probity must be the alternative: to see a set of men fixed in this their all-commanding seat, and making a proportionally extensive and pernicious use of it; or, for the purpose of taking what chance is to be had of precluding them from this advantage, to keep on straining every endeavour to make the House and the public look upon as pernicious, a measure, of the utility of which he is himself satisfied.

In the abomination of long and regularly corrupt parliaments lies the cause of this distress.

Under this system, when the whole system of abuses has a determined patron on the throne, and that patron has got a set of ministers that suit this ruling purpose, misrule may swell to such a pitch, that without any one measure in such sort bad that you can fix upon it, and say, this is a sufficient ground for punishment, or even for dismission, the State may be at the brink of ruin: — meantime some measure may be introduced, against which, though good, or at least innoxious of itself, the people, by means of some misrepresentation of matter of fact, or some erroneous opinion or other which prevails among them, may, to the disgrace and expulsion of the ministry, be turned against it; and then comes the distressing alternative.

But were the duration of the assembly short, and the great and surely effective mass of the matter of corruption expelled and kept out of it, no such alternative would ever present itself: the chance of ridding the country of a bad set of ministers would be renewed continually. The question supposed to be tried on each occasion might be the question really tried; whereas at present, on each occasion, the question tried is but one and the same, viz. Shall the ministry, or shall it not, continue?

The question brought on the carpet is like the wager in a feigned issue, a mere farce, which, but for its connexion with the principal question above mentioned, would not be deemed worth trying, and would not be tried.

CHAPTER XV.

REJECTION INSTEAD OF AMENDMENT — (*ad judicium.*)

Exposition. — This fallacy consists in urging, in the character of a bar, or conclusive objection against the proposed measure, some consideration which, if presented in the character of a proposed amendment, might have more or less claim to notice.

It generally consists of some real or imaginary inconvenience, alleged commonly, but not necessarily, as eventually to result from the adoption of the measure.

This inconvenience, supposing it real, will either be preponderant over the promised benefit, or not preponderant.

In either case, it will be either remediable or irremediable.

If at the same time irremediable and preponderant, then it is, and then only, that in the character of an objection it is of itself conclusive.

By him in whose mind discernment and candour are combined, this distinction will be not only felt, but brought to view. If in respect of adequate discernment there be a failure, it will not be felt: if in respect of candour only, it will have been felt, but it will not be brought to view.

The occasion by which opportunity is afforded for the working of this fallacy, is the creation of any new office, including the mass of emolument which, without inquiry into the necessity, or any means taken for keeping down the quantum of it within the narrowed limits which the good of the service admits of, is, by the union of habit with the sinister interest that gave birth to it, annexed as of course, upon their creation, to all new offices.

The **fallacy**,—what there is of fallacy in the case, consists in the practice of setting up the two universally applicable objections, viz. *need of economy*, and mischief or danger from the increase of the *influence of the crown*, in the character of peremptory bars to the proposed measure.

Exposure. — The ground on which an objection of this stamp may with propriety be considered and spoken of under the denomination of a fallacy, is where the utility of the proposed new establishment is left unimpeached, and the sole reason for the rejection proposed to be put upon the proposed measure, consists in the above topics, or one of them.

In such case, on the part of him by whom any objections so inconclusive in their nature are relied on, the reliance placed on them amounts to a virtual acknowledgment of the utility of the proposed new establishment: inasmuch as in an address from one rational being to another, nothing seems, upon the face of the statement at least, more unnatural, than that if a man could find any objection that would apply to the particular establishment in question, in contradistinction to all others, he should confine himself to an objection which applies alike to almost all existing establishments; that is, to almost the whole frame of the existing government.

Such is the case where the two commonplace objections in question, or either of them, are brought out in the character of objections by themselves, and without being accompanied by any specific ones.

But even when added to specific ones, an objection thus inconclusive in its nature, if urged in a direct way, and dwelt upon with any emphasis, can scarcely — at least while there remain any useless places unabolished, or any overpaid places, from which the overplus of emolument remains undefalcated—be exempted from the imputation of irrelevancy.

At any rate, wherever it happens that a minister at present in office sees opposite to him in the House another person who has at any time been in office, it seems an observation not very easy to answer in the character of an argument *ad hominem*, should it be said, "When you were in office, there were such and such offices which were of no manner of use; these you never used your endeavours to abolish, notwithstanding the use that would have resulted from the abolition, in the shape of diminution of needless expenditure and sinister influence: yet now, when a set of offices is proposed, for which you cannot deny but that there is *some* use, your exertions for the benefit of economy are reserved to be directed against these useful ones."

No doubt but that, on the supposition that the two opposite masses of advantage and disadvantage being completely in equilibrio, —advantage in the shape of service expected to be rendered in the proposed new offices on the one hand, disadvantage in the shape of expense — of the emolument proposed to be attached to them on the other, — a weight much less than that of the mischief from the increase of sinister influence, would suffice to turn the scale.

Take also another supposition. Suppose (what is not in every case possible) that the value of the service expected to be obtained by means of the proposed new offices is capable of being obtained, and has accordingly been obtained in figures. Suppose, on the other hand (what will very frequently be feasible,) that the expense of the establishment may with sufficient precision be obtained in figures — and being so obtained, on striking the balance, found to be less than the advantage so expected from the service. Suppose, lastly (what is impossible,) that the value of the mischief which, in the shape of introduction of additional influence, were with sufficient precision capable of standing expressed in figures, had been so expressed—and being so expressed, the quantity of mischief in this shape were found sufficient to turn the scale on the side of disadvantage.

Here would be a sufficient reason for the rejection of the proposed establishment, and thence a sufficient warrant for bringing into the field the argument in question, commonplace as it is. But in regard to this last supposition, at any rate, how far it is from being capable of being realized, is but too evident.

Upon the whole, therefore, so far at least as concerns the objection drawn from the increase that would result to the sinister influence of the crown, it may be said, that whatsoever time is spent in descanting upon this topic, may be set down to the account of lost time.

It is a topic, the importance of which is surely sufficient to entitle it to be considered by itself. The influence of the crown, it ought always to be remembered, can no otherwise receive with propriety the epithet sinister, than in so far as, by being directed to and reaching a member of parliament or a parliamentary elector, it affects the purity of parliament. But by a system of measures properly directed to that end, the constitution of parliament might be effectually guarded against any degree of impurity capable of being productive of any sensible inconvenience, whatsoever were the lucrativeness of the utmost number of offices, for the creation or preservation of which so much as a plausible reason could be found: and were it otherwise, the proper remedy would be found, not in the refusal to create any new office, the service of which was understood to overbalance in any determinate and unquestionable degree the mischief of the expense, but in the taking the nomination out of the hands of the crown, and vesting it in some other and independent hands.

The putting all places in these respects upon the same footing, — necessary and unnecessary ones — properly paid and overpaid ones, — wears out and weakens that energy which should be reserved for, and directed with all its force against, unnecessary places, and the overplus part of the pay of overpaid ones.

Another occasion on which this fallacy is often wont to be applied, is the case in which, from the mere observation of a profit as likely from any transaction to accrue to this or that individual, a censure is grounded, pronouncing it a *job*.

The error in case of sincerity, the fallacy in case of insincerity, consists, in forgetting that individuals are the stuff of which the public is made; that there is no way of benefiting the public but by benefiting individuals; and that a benefit which, in the shape of pleasure or exemption from pain, does not sooner or later come home to the bosom of at least some one individual, is not in reality a benefit — is not entitled to that name.

So far then from constituting an argument in disfavour of the proposed measure, every benefit that can be pointed out as accruing, or likely to accrue, to any determinate individual or individuals, constitutes, as far as it goes, an argument in favour of the measure.

In no case whatsoever — on no imaginable supposition — can this consideration serve with propriety in the character of an argument in disfavour of any measure. In no case whatsoever — on no imaginable supposition — can it, so far as it goes, fail of serving with propriety in the character of an argument in favour of the measure. Is the measure good? — it adds to the mass of its advantages. Is the measure upon the whole a bad one? — it subtracts, by the whole amount of it, from the real amount of the disadvantages attached to the measure.

At the same time, in practice, there is no argument, perhaps, which is more frequently employed, or on which more stress is laid, without doors at any rate, if not within doors, than this, in the character of an argument in disfavour of a proposed measure — no argument which, even when taken by itself, is with more confidence relied on in the character of a conclusive one.

To what cause is so general a perversion of the faculty of reason to be ascribed?

Two causes present themselves as acting in this character: —

1. It is apt to be received (and that certainly not without reason) in the character of evidence — conclusive evidence — of the nature of the motive, to the influence of which the part taken by the supporters of the measure, or some of them (viz. all who in any way are partakers of the private benefit in question,) ought to be ascribed.

In this character, to the justness of the conclusion thus drawn, there can in general be nothing to object.

But the consideration of the motive in which the part taken, either by the supporters or the opposers of a measure, finds its cause, has elsewhere been shown to be a consideration altogether irrelevant;* and the use of the argument has been shown to be of the number of those fallacies, the influence of which is in its natural and general tendency unfavourable to every good cause.

The other cause is, the prevalence of the passion of envy. To the man to whom it is an object of envy, the good of another man is evil to himself. By the envy of the speaker or writer, the supposed advantage to the third person is denounced in the character of an evil, to the envy of the hearers or the readers: — denounced, and perhaps without any perception of the mistake, so rare is the habit of self-examination, and so gross and so perpetual the errors into which, for want of it, the human mind is capable of being led.

In speaking of the passion or affection of *envy*, as being productive of this fallacious argument, and of the error but for which shame would frequently restrain a man from the employment of it, — it is not meant to speak of this passion or this affection as one of which, on the occasion in question, the influence ought to be considered as pernicious on the whole.

So far from being pernicious, the more thoroughly it is considered, the more closely it will be seen to be salutary upon the whole; and not merely salutary, at least in the best

* See Part II. Chap. I. *Personalities.*

state of things that has yet been realized, but so necessary, that without it, society would hardly have been kept together.

The legislator who resolves not to accept assistance from any but social motives — from none, save what in his vocabulary pass under the denomination of pure motives, will find his laws without vigour and without use.

The judge who resolves to have no prosecutors who are brought to him by any but pure motives, will not find that part of his emolument which, under the present system of abuse, is composed of fees, and may save himself the trouble of going into court — of sitting on penal causes. The judge who should determine to receive no evidence but what was at the same time brought to him, and, when before him, guided by pure motives, need scarcely trouble himself to hear evidence.

The practical inference is — that, if he would avoid drawing down disgrace upon himself instead of upon the measure he is opposing, a man ought to abstain from employing this argument in confutation of the fallacy; since, in as far as he employs it, he is employing in refutation of one fallacy (and that so gross an one, that the bare mention of it in that character may naturally be sufficient to reduce the employer to silence,) — he is employing another fallacy, which is of itself susceptible of a refutation no less easy and conclusive.

It is only by the interests, the affections the passions — (all these words mean nothing more than the same psychological object appearing in different characters) — that the legislator, labouring for the good and in the service of mankind, can effect his purposes. Those interests, acting in the character of motives, may be of the self-regarding class, the dissocial, or the social: — the social he will, on every occasion where he finds them already in action, endeavour not only to engage in his service, but cherish and cultivate: the self-regarding and the dissocial, though his study will be rather to restrain than encourage them, he will at any rate, wherever he sees them in action or likely to come into action, use his best endeavours to avail himself of directing their influence, with whatever force he can muster, to his own social purposes.

PART V

CHAPTER I.

CHARACTERS COMMON TO ALL THESE FALLACIES.

UPON the whole, the following are the characters which appertain in common to all the several arguments here distinguished by the name of fallacies: —

1. Whatsoever be the measure in hand, they are, with relation to it, irrelevant.

2. They are all of them such, that the application of these irrelevant arguments affords a presumption either of the weakness or total absence of relevant arguments on the side on which they are employed.

3. To any good purpose they are all of them unnecessary.

4. They are all of them not only capable of being applied, but actually in the habit of being applied, and with advantage, to bad purposes; viz. to the obstruction and defeat of all such measures as have for their object and their tendency, the removal of the abuses or other imperfections still discernible in the frame and practice of the government.

5. By means of their irrelevancy, they all of them consume and misapply time, thereby obstructing the course, and retarding the progress of all necessary and useful business.

6. By that irritative quality which, in virtue of their irrelevancy, with the improbity or weakness of which it is indicative, they possess, all of them, in a degree more or less considerable, but, in a more particular degree such of them as consist in personalities, they are productive of ill-humour, which in some instances has been productive of bloodshed, and is continually productive, as above, of waste of time and hindrance of business.

7. On the part of those who, whether in spoken or written discourses, give utterance to them, they are indicative either of improbity or intellectual weakness, or of a contempt for the understandings of those on whose minds they are destined to operate.

8. On the part of those on whom they operate, they are indicative of intellectual weakness: and on the part of those in and by whom they are pretended to operate, they are indicative of improbity; viz. in the shape of insincerity.

The practical conclusion is, that in proportion as the acceptance, and thence the utterance of them, can be prevented, the understanding of the public will be strengthened, the morals of the public will be purified, and the practice of government improved.

CHAPTER II.

OF THE MISCHIEF PRODUCIBLE BY FALLACIES.

THE first division that presents itself in relation to the mischief of a fallacy, may be expressed by the words specific and general.

The specific mischief of a fallacy consists in the tendency which it has to prevent or obstruct the introduction of this or that useful measure in particular.

The general mischief consists in that moral or intellectual depravation which produces habits of false reasoning and insincerity: — this mischief may again be distinguished into mischief produced *within doors* and mischief produced *without doors*.

Under the appellation of mischief within doors, is to be understood all that mischief, that deception, which has its seat in the bosom of any member of the supreme legislative body.

Under the appellation of mischief without doors, all that which has its seat in the bosom of any person not included in that body — of any person whose station is among the people at large: —

CHAPTER III.

CAUSES OF THE UTTERANCE OF THESE FALLACIES.

THE causes of the utterance of these fallacies may, it should seem, be thus denominated and enumerated: —

1. Sinister interest — self-conscious sinister interest.
2. Interest-begotten prejudice.
3. Authority-begotten prejudice.
4. Self-defence, *i. e.* sense of the need of self-defence against counter-fallacies.

First cause, — *Sinister Interest, of the operation of which the party affected by it is conscious.*

The mind of every public man is subject at all times to the operation of two distinct interests — a public and a private one. His public interest is that which is constituted of the share he has in the happiness and well-being of the whole community, or of the major part of it: his private interest is constituted of, or by, the share he has in the well-being of some portion of the community less than the major part; of which private interest, the smallest possible portion is that which is composed of his own individual — his own personal — interest.

In the greater number of instances, these two interests are not only distinct, but opposite: and that to such a degree, that if either be exclusively pursued, the other must be sacrificed to it.

Take, for example, pecuniary interest. It is the personal interest of every public man at whose disposal public money extracted by taxes from the whole community is placed, that as large a share as possible, and if possible the whole of it, should remain there for his own use: it is at the same time the interest of the public, including his own portion of the public interest, that as small a share as possible, and if possible no part at all, remain in these same hands for his personal or any other private use.

Taking the whole of life together, there exists not, nor ever can exist, that human being in whose instance any public interest he can have had, will not, in so far as depends upon himself, have been sacrificed to his own personal interest. Towards the advancement of the public interest, all that the most public-spirited, which is as much as to say the most virtuous of men, can do, is to do what depends upon himself towards bringing the public interest — that is, his own personal share in the public interest, to a state as nearly approaching to coincidence, and on as few occasions amounting to a state of repugnance, as possible with his private interests.

Were there ever so much reason for regretting it, the sort of relation which is thus seen to have place between public and private interest would not be the less true: nor would it be the less incumbent on the legislator — nor would the legislator, in so far as he finds it reconcilable to his personal interest to pursue the public interest, be the less disposed and determined — to act and shape his measures accordingly.

But the more correct and complete a man's conception of the subject is, the more clearly will he understand, that in this natural and general predominance of personal over every more extensive interest, there is no just cause for regret. Why? Because upon this predominance depends the existence of the species, and the existence of every individual belonging to it. Suppose for a moment the opposite state of things — a state in which every one should prefer the public to himself: and the consequences — the necessary consequences, would be no less ridiculous in idea, than disastrous and destructive in reality.

In the ordinary course and strain of legislation, no supposition inconsistent with this only true and rational one is acted upon. On this supposition is built whatsoever is done in the application made either of the matter of reward, or of the matter of punishment, to the purposes of government. The supposition is — that on the part of every individual whose conduct it is thus endeavoured to shape and regulate, interest, and that private interest, will be the cause by the operation of which his conduct will be determined: not only so, but that in case of competition as

between such public and such private interest, it is the private interest that will predominate.

If the contrary supposition were acted upon, what would be the consequence? That neither in the shape of reward, nor in the shape of eventual punishment, would the precious matter of good and evil be wasted or exposed to waste, but (in lieu of requisition, with reward or punishment, or both, for its sanction, for securing compliance) advice and recommendation would be employed throughout the system of law, penal as well as remuneratory.

Thence it is, that in so far as in the instance of any class of men the state of the law is such as to make it the interest of men belonging to that body to give rise or continuance to any system of abuse however flagrant, a prediction that may be made with full assurance is, that the conduct of that body — that is, of its several members with few or no exceptions — will be such as to give rise or continuance to that system of abuse: and if there be any means which have been found to be, or promise to be, conducive to any such end, such means will accordingly, how inconsistent soever with probity in any shape, and in particular in the shape of sincerity, be employed.

A common bond of connexion, says Cicero somewhere, has place among all the virtues. To the word *virtue*, substitute the word *abuse*, meaning abuse in government, and the observation will be no less true. Among abuses in government, besides the logical *commune vinculum* composed of the common denomination *abuse*, there exists a moral *commune vinculum* composed of the particular and sinister interest in which all men who are members of a government so circumstanced have a share.

So long, then, as any man has any the smallest particle of this sinister interest belonging to him — so long has he an interest, and consequently a fellow-feeling with every other man who in the same situation has an interest of the like kind. Attack one of them, you attack all; and in proportion as each of them feels his share in this common concern dear to him, and finds himself in a condition to defend it, he is prepared to defend every other confederate's share with no less alacrity than if it were his own. But it is one of the characteristics of abuse, that it can only be defended by fallacy. It is therefore the interest of all the confederates of abuse to give the most extensive currency to fallacies, — not only to such as may be serviceable to each individual, but also to such as may be generally useful. It is of the utmost importance to them to keep the human mind in such a state of imbecility, as shall render it incapable of distinguishing truth from error.

Abuses — that is to say, institutions beneficial to the few at the expense of the many — cannot openly, directly, and in their own character, be defended: if at all, it must be in company with, and under the cover of other institutions, to which this character either does not in fact appertain, or is not seen to appertain.

For the few who are in possession of power, the principle the best adapted, if it were capable of being set to work, would be that which should be applicable to the purpose of giving to the stock of abuses established at each given period, an unlimited increase.

No longer than about a century ago, a principle of this cast actually was in force, and that to an extent that threatened the whole frame of society with ruin; viz. under the name of the principle of *passive obedience* and *non-resistance*.

This principle was a *primum mobile*, by the due application of which, abuses in all shapes might be manufactured for use, to an amount absolutely unlimited.

But this principle has now nearly, if not altogether, lost its force. The creation of abuses has therefore of necessity been given up; the preservation of them is all that remains feasible: it is to this work that all exertions in favour of abuse have for a considerable time past, and must henceforward be confined.

Institutions — some good, some bad — some favourable to both the few and the many — some favourable to the few alone, and at the expense of the many — are the ingredients of which the existing system is composed. He who protects all together, and without discrimination, protects the bad. To this object the exertions of industry are still capable of being directed with a prospect of success: and to this object they actually do continue to be directed, and with a degree of success disgraceful to the probity of the few by whom such breach of trust is practised, and to the intellect of the many by whom it is endured.

If the fundamental principle of all good government — viz. that which states as being on every occasion the proper, and the only proper end in view and object of pursuit, the greatest happiness of the greatest number — were on every occasion set up as the mark; on each occasion the particular question would be, by what particular means can this genera. object be pursued with the greatest probability of success?

But by the habit of recurring to and making application of this one principle, the eye of the inquirer, the tongue of the speaker, and the pen of the writer, would, on every part of the field of legislation, be brought to some conclusion — passing condemnation on some or other of those abuses, the continuance of

which has this common interest for its support.

In a word, so long as any one of these relatively profitable abuses continues unremedied, — so long must there be one such person, or more, to whose interest the use of reason is prejudicial, and to whom not only the particular beneficial measure from which that particular abuse would receive its correction, but every other beneficial measure, in so far as it is supported by reason, will also be prejudicial in the same way.

It is under the past and still existing state of things — in other words, under the dominion of usage, custom, precedent, acting without any such recurrence to this only true principle — that the abuses in question have sprung up. Custom, therefore, blind custom, in contradiction and opposition to reason, is the standard which he will on every occasion endeavour to set up as the only proper, safe, and definable standard of reference. Whatever is, is right: everything is as it should be. These are his favourite maxims — maxims which he will let slip no opportunity of inculcating to the best advantage possible.

Having, besides his share in the sinister interest, his share in the universal and legitimate interest, there must, to a corresponding extent, be laws and institutions, which, although good and beneficial, are no less beneficial to and necessary to his interest, than to that of the whole community of which he makes a part. Of these, then, in so far as they are necessary to his interest, he will be as sincere and strenuous a defender, as of those by which any part of the abuses which are subservient to his sinister interest is maintained.

It is conducive, for instance, to his interest, that the country should be effectually defended against the assault of the common enemy; that the persons and properties of the members of the community in general, his own included, should be as effectually as possible protected against the assaults of internal enemies — of common malefactors.

But it is under the dominion of custom — blind, or at best purblind custom — that such protection has been provided. Custom, therefore, being sufficient for his purpose — reason always adverse to it — custom is the ground on which it will be his endeavour to place every institution, the good as well as the bad. Referred to general utility as their standard, shown to be conformable to it by the application of reason to the case, they would be established and supported, indeed, on firmer ground than at present. But by placing them on the ground of utility, by the application of reason he has nothing to gain, while, as hath been seen above, he has every thing to lose and fear from it.

The principle of general utility, he will accordingly be disposed to represent in the character of "*a dangerous principle*:" for so long as blind custom continues to serve his purpose, such, with reference to him and his sinister interest, the principle of general utility really is.

Against the recognition of the principle of general utility, and the habit of employing reason as an instrument for the application of it, the leading members of the government, in so far as corruption has pervaded the frame of government, and in particular the members of all ranks of the profession of the law, have the same interest as in the eyes of Protestants and other non-catholics, the Pope and his subordinates had at the time and on the occasion of the change known in England by the name of the *Reformation*.

At the time of the Reformation, the opposition to general utility and human reason was conducted by fire and sword. At present, the war against these powers cannot be completely carried on by the same engines.

Fallacies, therefore, applied principally to the purpose of devoting to contempt and hatred those who apply the principle of general utility on this ground, remain the only instruments in universal use and request for defending the strongholds of abuse against hostile powers.

These engines we accordingly see applied to this purpose in prodigious variety, and with more or less artifice and reserve.

CHAPTER IV.

SECOND CAUSE — INTEREST BEGOTTEN-PREJUDICE.

IF by interest in some shape or other — that is, by a motive of some sort or other — every act of the will, and thence every act of the hand, is produced, so, directly or indirectly, must every act of the intellectual faculty: though in this case the influence of the interest, of this or that motive, is neither so perceptible, nor in itself so direct as in the other.

But how (it may be asked) is it possible that the motive a man is actuated by can be secret to himself? Nothing is more easy — nothing more frequent: indeed the rare case is, not that of his not knowing, but that of his knowing it.

It is with the anatomy of the human mind as with the anatomy and physiology of the human body: the rare case is, not that of a man's being unconversant, but that of his being conversant with it.

The physiology of the body is not without its difficulties: but in comparison of those by which the knowledge of the physiology of the mind has been obstructed, the difficulties are slight indeed.

Not unfrequently, as between two persons

living together in a state of intimacy, either or each may possess a more correct and complete view of the motives by which the mind of the other, than of those by which his own mind, is governed.

Many a woman has in this way had a more correct and complete acquaintance with the internal causes by which the conduct of her husband has been determined, than he has had himself.

The cause of this is easily pointed out. — By interest, a man is continually prompted to make himself as correctly and completely acquainted as possible with the springs of action by which the minds of those are determined, on whom he is more or less dependent for the comfort of his life.

But by interest, he is at the same time diverted from any close examination into the springs by which his own conduct is determined.

From such knowledge he has not, in any ordinary shape, anything to gain, — he finds not in it any source of enjoyment.

In any such knowledge he would be more likely to find mortification than satisfaction. The purely social motives, the semi-social motives, and, in the case of the dissocial motives, such of them as have their source in an impulse given by the purely social or by the semi-social motives,*—these are the motives, the prevalence of which he finds mentioned as matter of praise in the instance of other men: it is by the supposed prevalence of these amiable motives, that he finds reputation raised, and that respect and good-will in which every man is obliged to look for so large a portion of the comfort of his life.

In these same amiable and desirable endowments he finds the minds of other men actually abounding and overflowing: abounding during their lifetime by the testimony of their friends, and after their departure by the recorded testimony enregistered in some monthly magazine, with the acclamation of their friends, and with scarce a dissenting voice from among their enemies.

But the more closely he looks into the mechanism of his own mind, the less of the mass of effects produced he finds referable to any of those amiable and delightful causes; he finds nothing, therefore, to attract him towards this study — he finds much to repel him from it.

Praise and self-satisfaction on the score of moral worth, being accordingly hopeless, it is in intellectual that he will seek for it. "All men who are actuated by regard for anything but self, are fools; those only whose regard is confined to self, are wise. I am of the number of the wise."

Perhaps he is a man with whom a large proportion of the self-regarding motives may be mixed up with a slight tincture of the social motives operating upon the private scale. What in this case will he do? In investigating the source of a given action, he will in the first instance set it down, the whole of it, to the account of the amiable and conciliatory — in a word, the social motives. This, in the study of his own mental physiology, will always be his first step, and this will commonly be his last. Why should he look further? — why take in hand the probe?—why undeceive himself, and substitute a whole truth that would mortify him, for a half truth that flatters him?

The greater the share which the motives of the social class have in the production of the general tenour of a man's conduct, the less irksome, it seems evident, this sort of psychological self-anatomy will be. The first view is pleasing; and the more virtuous the man, the more pleasing is that study which to every man has been pronounced the proper one.

But the less irksome any pursuit is, the greater, if the state of faculties, intellectual and active, permit, will be a man's progress in it.

CHAPTER V.

THIRD CAUSE — AUTHORITY-BEGOTTEN PREJUDICE.

PREJUDICE is the name given to an opinion of any sort, on any subject, when considered as having been embraced without sufficient examination: it is a judgment, which being pronounced *before* evidence, is therefore pronounced without evidence.

Now, at the hazard of being deceived, and by deception led into a line of conduct prejudicial either to himself or to some one to whom it would rather be his wish to do service, what is it that could lead a man to embrace an opinion without sufficient examination?

One cause is, the uneasiness attendant on the labour of examination: he takes the opinion up as true, to save the labour that might be necessary to enable him to discern the falsity of it.

Of the propensity to take not only facts but opinions upon trust, the universality is matter of universal observation. Pernicious as it is in some of its applications, it has its root in necessity, in the weakness of the human mind. In the instance of each individual, the quantity of opinion which it is possible for him to give acceptance or rejection to, on the ground of examination performed by himself, bears but a small proportion to that in which such judgment as he passes upon it

* See *Introduction to Morals and Legislation* in Vol. I.

cannot have any firmer or other ground than that which is composed of the like judgment pronounced by some other individual or aggregate of individuals: the cases in which it is possible for his opinion to be *home-made*, bear but a small proportion to the cases in which, if any opinion at all be entertained by him, that opinion must necessarily have been imported.

But in the case of the public man, this necessity forms no justification either for the utterance or for the acceptance of such arguments of base alloy, as those which are represented under the name of fallacies.

These fallacies are not less the offspring of sinister interest, because the force of authority is more or less concerned. Where authority has a share in the production of them, there are two distinguishable ways in which sinister interest may also have its share.

A fallacy which, in the mouth of A, had its root immediately in interest — in self-conscious sinister interest — receiving utterance from his pen or his lips, obtains, upon the credit of his authority, credence among acceptors in any multitude. Having thus rooted itself in the minds of men, it becomes constitutive of a mass of authority, under favour of which, such fallacies as appear conducive to the planting or rooting in the minds of men in general, the erroneous notion in question, obtain, at the hands of other men, utterance and acceptance.

2. Having received the prejudice at the hands of authority — viz. of the opinion of those whose adherence to it was produced immediately or mediately by the operation of sinister interest, — sinister interest operating on the mind of the utterer or acceptor of the fallacy in question, prompts him to bestow on it, in the character of a rational argument, a degree of attention exceeding that which could otherwise have been bestowed on it; he fixes, accordingly, his attention on all considerations, the tendency of which is to procure for it utterance or acceptance, and keeps at a distance all considerations by which the contrary tendency is threatened.

CHAPTER VI.

FOURTH CAUSE — SELF-DEFENCE AGAINST COUNTER-FALLACIES.

THE opposers of a pernicious measure may be sometimes driven to employ fallacies, from their supposed utility as an answer to counter-fallacies.

"Such is the nature of men," they may say, "that these arguments, weak and inconclusive as they are, are those which on the bulk of the people (upon whom ultimately everything depends) make the strongest and most effectual impression: the measure is a most mischievous one; — it were a crime on our parts to leave unemployed any means not criminal, that promise to be contributory to its defeat. It is the weakness of the public mind, not the weakness of our cause, that compels us to employ such engines in the defence of it."

This defence might indeed be satisfactory, where the fallacies in question are employed — not as *substitutes*, but only as *supplements* to relevant and direct arguments.

But if employed as supplements, to prove their being employed in that character, and in that character only, and that the use thus made of them is not inconsistent with sincerity, two conditions seem requisite: —

1. That arguments of the direct and relevant kind be placed in the front of the battle, declared to be the main arguments, the arguments and considerations by which the opposition or support to the proposed measure was produced;

2. That on the occasion of employing the fallacies in question, an acknowledgment should be made of their true character, of their intrinsic weakness, and of the considerations which, as above, seemed to impose on the individual in question the obligation of employing them, and of the regret with which the consciousness of such an obligation was accompanied.

If, even when employed in opposition to a measure really pernicious, these warnings are omitted to be annexed to them, the omission affords but too strong a presumption of general insincerity. On the occasion in question, a man would have nothing to fear from any avowal made of their true character. Yet he omits to make this avowal. Why? Because he foresees that, on some other occasion or occasions, arguments of this class will constitute his sole reliance.

The more closely the above considerations are adverted to, the stronger is the proof which the use of such arguments, without such warnings, will be seen to afford of improbity or imbecility, or a mixture of the two, on the part of him by whom they are employed: of imbecility of mind, if the weakness of such arguments has really failed of becoming visible to him; of improbity, if, conscious of their weakness, and of their tendency to debilitate and pervert the faculties, intellectual and moral, of such persons as are swayed by them, he gives currency to them unaccompanied by such warning.

Is it of the one or of the other species of imperfection, or of a mixture of both, that such deceptious argumentation is evidentiary? On this occasion, as on others, the answer is not easy; nor, fortunately, is it material to estimate the connexion between these two divisions of the mental frame: so constantly and so materially does each of them exert an

influence on the other, that it is difficult for either to suffer, but the other must suffer more or less along with it. On many a well-meaning man this base and spurious metal has no doubt passed for sterling; but if you see it burnished, and held up in triumph by the hands of a man of strong as well as brilliant talents — by a very Master of the Mint—set him down, without fear of injuring him, upon the list of those who deceive, without having any such excuse to plead as that of having been deceived.

CHAPTER VII.

USE OF THESE FALLACIES TO THE UTTERERS AND ACCEPTORS OF THEM.

BEING all of them to such a degree replete with absurdity — many of them upon the face of them composed of nothing else — a question that naturally presents itself is, how it has happened that they have acquired so extensive a currency? — how it is that so much use has been made, and continues to be made, of them?

Is it credible (it may be asked,) that, to those by whom they are employed, the inanity and absurdity of them should not be fully manifest?—is it credible, that on such grounds political measures should proceed?

No, it is not credible: to the very person by whom the fallacy is presented in the character of a reason — of a reason on the consideration of which his opinion has been formed, and on the strength of which his conduct is grounded — it has presented itself in its genuine colours.

But in all assemblies in which shares in power are exercised by votes, there are two descriptions of persons whose convenience requires to be consulted — the speakers and the hearers.

To the convenience of persons in both these situations, the class of arguments here in question are in an eminent degree favourable: —

As to the situation of the speaker: — the more numerous and efficient the titles to respect which his argument enables him to produce, the more convenient and agreeable is that situation made to him. Probity in the shape of independence — superiority in the article of wisdom — superiority in the scale of rank: of all these qualities, the reputation is matter of convenience to a man; and of all these qualities, the reputation is by these arguments promised to be made secure.

1. As to independence: — when a man stands up to speak for the purpose of reconciling men to the vote he purposes to give, or for the purpose of giving to the side which he espouses whatsoever weight is regarded by him as attached to his authority, — the nature of the purpose imposes on him a sort of necessity of finding something in the shape of a reason to accompany and recommend it.

Though in fact directed and governed by some other will behind the curtain, and by the interest by which that other will is governed, decency is understood to require, that it is from his own understanding, not from the will of any other person, that his own will should be understood to have received its direction.

But it is not by the matter of *punishment* or the matter of *reward* — it is not by *fears* or *hopes* — it is not by *threats* or *promises* — it is by something of the nature, or in the shape at least of a reason, that *understanding* is governed and determined. To show, then, that it is by the determination of his own judgment that his conduct is determined, it is deemed advisable to produce some observation or other in the character of the determinate reason, from which, on the occasion in question, his judgment, and thence his will, and active faculty, have received their direction.

The argument is accordingly produced, and by this exhibition the independent character of his mind is established by irrefragable evidence.

To this purpose, every article in the preceding catalogue may with more or less effect be made to serve, according to the nature of the case.

2. Next as to superiority in the scale of *wisdom*: — on running over the list, different articles will be seen to present in this respect different degrees of convenience.

Some of them will be seen scarcely putting in any special title to this praise.

In others, while the reputation of prudence is secured, yet it is that sort of prudence, which by the timidity attached to it is rendered somewhat the less acceptable to an erect and commanding mind.

To this class may be referred the arguments *ad metum* and *ad verecundiam*, — the hydrophobia of innovation, and argument of the ghost-seer, whose nervous system is kept in a state of constant agitation by the phantom of Jacobinism dancing before his eyes, — the idolator, who beholding in ancestry, in authority, in allegorical personages of various sorts and sizes, in precedents of all sorts, in great characters dead and living, placed in high situations, so many tyrants to whose will, real or supposed, blind obsequiousness at the hands of the vulgar of all classes, may by apt ceremonies and gesticulation be secured, makes himself the first prostration, in the hope and confidence of finding it followed by much and still more devout prostration, on the part of the crew of inferior idolators, in whose breasts the required obsequiousness has been implanted by long practice.

Other arguments, again, there are, in and for the delivery of which the wisdom of the orator places itself upon higher ground. His acuteness has penetrated to the very bottom

of the subject — his comprehension has embraced the whole mass of it — his adroitness has stripped the obnoxious proposal of the delusive colouring by which it had recommended itself to the eye of ignorance: he pronounces it speculative, theoretical, romantic, visionary: it may be good in theory, but it would be bad in practice: it is too good to be practicable: the goodness which glitters on the outside is sufficient proof, is evidence, and that conclusive, of the worthlessness that is within: its apparent facility suffices to prove it to be impracticable. The confidence of the tone in which the decision is conveyed, is at once the fruit and the sufficient evidence of the complete command which the glance of the moment sufficed to give him of the subject in all its bearings and dependencies. By the experience which his situation has led him to acquire, and the use which his judgment has enabled him to make of that experience, he catches up at a single glance those features which suffice to indicate the class to which the obnoxious proposal belongs.

3. By the same decision, delivered in the same tone, superiority of rank is not less strikingly displayed, than superiority of talent. It is no new observation how much the persuasion, or at least the expression given to it, is strengthened by the altitude of the rank as constituted or accompanied by the fullness of the purse.

The labour of the brain, no less than that of the hand, is a species of drudgery which the man of elevated station sees the propriety and facility of turning over to the base-born crowd below — to the set of plodders whom he condescends upon occasion to honour with his conversation and his countenance. By his rank and opulence he is enabled in this, as in other ways, to pick and choose what is most congenial to his taste. By the royal hand of Frederic, philosophers and oranges were subjected to the same treatment, and put to the same use. The sweets, the elaboration of which had been the work of years, were elicited in a few moments by the pressure of an expert hand.

The praise of the receiver of wisdom is always inferior to that of the utterer; but neither is the receiver, so he but make due profit of what he receives, without his praise.

The advantage he acquires from these arguments, is — that of being enabled to give the reason of the faith that is, or is supposed to be, in him.

In some circumstances, in which silence will not serve a man, it will, and to a certainty, be construed into a confession of self-convicting consciousness; — consciousness that what he does is wrong and indefensible, — that what he gives men to understand to be his opinion, is not really his opinion, — that of the supposed facts, which he has been asserting to form an apparent foundation for his supposed opinion, the existence is not true.

By a persuasion to any such effect, on the part of those with whom he has to do, his credit, his reputation, would be effectually destroyed.

Something, therefore, must be said, of which it may be supposed that, how little soever may be the weight properly belonging to it, it may have operated on his mind in the character of a reason. By this means his reputation for wisdom is all that is exposed to suffer; — his reputation for probity is saved.

Thus, in the case of this sort of base argument, as sometimes in the case of bad money, each man passes it off upon his neighbour, not as being unconscious of its worthlessness — not so much as expecting his neighbour to be really insensible of its worthlessness — but in the hope and expectation that the neighbour, though not insensible of its worthlessness, may yet not find himself altogether debarred from the supposition, that to the utterer of the base argument, the badness of it may possibly not have been clearly understood.

But the more generally current in the character of an argument any such absurd notion is, the greater is the apparent probability of its being really entertained: for there is no notion, actual or imaginable, that a man cannot be brought to entertain, if he be but satisfied of its being generally or extensively entertained by others.

CHAPTER VIII.

PARTICULAR DEMAND FOR FALLACIES UNDER THE ENGLISH CONSTITUTION.

Two considerations will suffice to render it apparent that, under the British Constitution, there cannot but exist, on the one hand, such a demand for fallacies — and, on the other hand, such a supply of them, as, for copiousness and variety taken together, cannot be to be matched elsewhere.

1. In the first place, a thing necessary to the existence of the demand is, discussion to a certain degree free.

Where there are no such institutions as a popular assembly taking an efficient part in the government, and publishing or suffering to be published accounts of its debates, — nor yet any free discussion through the medium of the press, — there is, consequently, no demand for fallacies. Fallacy is fraud, and fraud is useless when everything may be done by force.

The only case which can enter into comparison with the English government, is that of the Anglo-American United States.

There, on the side of the *outs*, the demand for fallacies stands, without any diffe-

rence worth noticing, on a footing similar to that on which it stands under the English constitution.

But the side of the *outs* is that side on which the demand for fallacies is by much the least urgent and abundant.

On the side of the *ins*, the demand for fallacies depends upon the aggregate mass of abuse: its magnitude and urgency depend upon the magnitude of that mass, and its variety upon the variety of the shapes in which abuse has manifested itself.

On crossing the water, fortune gave to British America, the relief that policy gave to the fox; of the vermin by which she had been tormented, a part were left behind.

No deaf auditors of the Exchequer, — no blind surveyors of melting irons, — no non-registering registrars of the Admiralty court, or of any other judicatory, — no tellers, by whom no money is told, but that which is received into their own pockets, — no judge acting as clerk under himself, — no judge pocketing £7000 a-year for useless work, for which men are forced to address his clerks, — no judge, who in the character of judge over himself sits in one place to protect, by storms of fallacy and fury, the extortions and oppressions habitually committed in another, — no tithe-gatherers exacting immense retribution for minute or never-rendered service.

With respect to the whole class of fallacies built upon authority, — precedent, wisdom of ancestors, dread of innovation, immutable laws, and many others, occasioned by ancient ignorance and ancient abuses — what readers soever there may be, by whom what is to be found under those several heads has been perused, to them it will readily occur, that in the American Congress the use made of these fallacies is not likely to be so copious as in that august assembly, which, as the only denomination it can with propriety be called by, has been pleased to give itself that of the Imperial Parliament of Great Britain and Ireland.

CHAPTER IX.

THE DEMAND FOR POLITICAL FALLACIES: — HOW CREATED BY THE STATE OF INTERESTS.

IN order to have a clear view of the object to which political fallacies will in the greatest number of instances be found to be directed, it will be necessary to advert to the state in which, with an exception comparatively inconsiderable, the business of government ever has been, and still continues to be, in every country upon earth; and for this purpose must here be brought to view a few positions, the proof of which, if they require any, would require too large a quantity of matter for this place — positions which, if not immediately assented to, will at any rate, even by those whom they find most adverse, be allowed to possess the highest claim to attention and examination:

1. The end or object in view, to which every political measure, whether established or proposed, ought according to the extent of it to be directed, is the greatest happiness of the greatest number of persons interested in it, and that for the greatest length of time.

2. Unless the United States of North America be virtually an exception, in every known state the happiness of the many has been at the absolute disposal either of the one or of the comparatively few.

3. In every human breast — rare and short-lived ebullitions, the result of some extraordinary strong stimulus or incitement excepted — self-regarding interest is predominant over social interest: each person's own individual interest, over the interests of all other persons taken together.

4. In the few instances, if any, in which, throughout the whole tenor or the general tenor of his life, a person sacrifices his own individual interest to that of any other person or persons, such person or persons will be a person or persons with whom he is connected by some domestic or other private and narrow tie of sympathy; not the whole number, or the majority of the whole number, of the individuals of which the political community to which he belongs is composed.

5. If in any political community there be any individuals by whom, for a constancy, the interests of all the other members put together are preferred to the interest composed of their own individual interest, and that of the few persons particularly connected with them, these public-spirited individuals will be so few, and at the same time so impossible to distinguish from the rest, that to every practical purpose they may, without any practical error, be laid out of the account.

6. In this general predominance of self-regarding over social interest, when attentively considered, there will not be found any just subject of regret, any more than of contestation; for it will be found, that but for this predominance, no such species as that which we belong to could have existence: and that, supposing it, if possible, done away, insomuch that all persons, or most persons, should find respectively, some one or more persons, whose interest was respectively, through the whole of life, dearer to them, and as such more anxiously and constantly watched over than their own, the whole species would necessarily, within a very short space of time, become extinct.

7. If this be true, it follows, by the unchangeable constitution of human nature, that in every political community, by the hands by

which the supreme power over all the other members of the community is shared, the interest of the many over whom the power is exercised, will on every occasion, in case of competition, be in act or in endeavour sacrificed to the particular interest of those by whom the power is exercised.

8. But every arrangement by which the interest of the many is sacrificed to that of the few, may with unquestionable propriety, if the above position be admitted, and to the extent of the sacrifice, be termed a bad arrangement; indeed, the only sort of bad arrangement—those excepted, by which the interest of both parties is sacrificed.

9. A bad arrangement, considered as already established and in existence, is, or may be termed, *an abuse*.

10. In so far as any competition is seen, or supposed to have place, the interests of the subject many being on every occasion, as above, in act or in endeavour constantly sacrificed by the ruling few to their own particular interests,—hence, with the ruling few, a constant object of study and endeavour is the preservation and extension of the mass of abuse: at any rate, such is the constant propensity.

11. In the mass of abuse, which, because it is so constantly their interest, it is constantly their endeavour to preserve, is included not only that portion from which they derive a direct and assignable profit, but also that portion from which they do not derive any such profit. For the mischievousness of that from which they do not derive any such direct and particular profit, cannot be exposed but by facts and observations, which, if pursued, would be found to apply also to that portion from which they do derive direct and particular profit. Thus it is, that in every community, all men in power—or, in one word, the *ins*—are, by self-regarding interest, constantly engaged in the maintenance of abuse in every shape in which they find it established.

12. But whatsoever the *ins* have in possession, the *outs* have in expectancy. Thus far, therefore, there is no distinction between the sinister interests of the *ins* and those of the *outs*, nor, consequently, in the fallacies by which they respectively employ their endeavours in the support of their respective sinister interests.

13. Thus far the interests of the outs coincide with the interest of the ins. But there are other points in which their interests are opposite. For procuring for themselves the situations and mass of advantages possessed by the ins, the outs have one, and but one, mode of proceeding. This is the raising their own place in the scale of political reputation, as compared with that of the ins. For effecting this ascendency, they have accordingly two correspondent modes: the raising their own, and the depreciating that of their successful rivals.

14. In addition to that particular and sinister interest which belongs to them in their quality of ruling members, these rivals have their share in the universal interest which belongs to them in their quality of members of the community at large. In this quality, they are sometimes occupied in such measures as in their eyes are necessary for the maintenance of the universal interest—for the preservation of that portion of the universal happiness of which their regard for their own interests does not seem to require the sacrifice: for the preservation, and also for the increase of it; for by every increase given to it they derive advantage to themselves, not only in that character which is common to them with all the other members of the community, but, in the shape of reputation, in that character of ruling members which is peculiar to themselves.

15. But in whatsoever shape the ins derive reputation to themselves, and thus raise themselves to a higher level in the scale of comparative reputation, it is the interest of the outs, as such, not only to prevent them from obtaining this rise, but if possible, and as far as possible, to cause their reputation to sink. Hence, on the part of the outs there exists a constant tendency to oppose all good arrangements proposed by the ins. But, generally speaking, the better an arrangement really is, the better it will generally be thought to be; and the better it is thought to be, the higher will the reputation of its supporters be raised by it. In so far, therefore, as it is in their power, the better a new arrangement proposed by the ins is, the stronger is the interest by which the outs are incited to oppose it. But the more obviously and indisputably good it is when considered in itself, the more incapable it is of being successfully opposed in the way of argument otherwise than by fallacies; and hence, in the aggregate mass of political fallacies, may be seen the character and general description of that portion of it which is employed chiefly by the outs.

16. In respect and to the extent of their share in the universal interest, an arrangement which is beneficial to that interest will be beneficial to themselves: and thus, supposing it successful, the opposition made by them to the arrangement would be prejudicial to themselves. On the supposition, therefore, of the success of such opposition, they would have to consider which in their eyes would be the greater advantage—their share in the advantage of the arrangement, or the advantage promised to them by the rise of their place in the comparative scale of reputation, by the elevation given to themselves, and the depression caused to their adversaries.

But, generally speaking, in a constitution such as the English in its present state, the chances are in a prodigious degree against the success of any opposition made by the outs to even the most flagrantly bad measure of the ins: much more, of course, to a really good one. Hence it is, that when the arrangement is in itself *good*, if with any prospect of success or advantage, any of the fallacies belonging to their side can be brought up against the arrangement, and this without prejudice to their own reputation, — they have nothing to stand in the way of the attempt.

17. In respect of those *bad* arrangements which by their sinister interest the ins stand engaged to promote, and in the promotion of which the outs have, as above, a community of interest, — the part dictated by their sinister interest is a curious and delicate one. By success, they would lessen that mass of sinister advantage which, being that of their antagonists in possession, is theirs in expectancy. They have, therefore, their option to make between this disadvantage and the advantage attached to a correspondent advance in the scale of comparative reputation. But, their situation securing to them little less than a certainty of failure, they are, therefore, as to this matter, pretty well at their ease. At the same time, seeing that whatsoever diminution from the mass of abuse they were to propose in the situation of outs, they could not, without loss of reputation, unless for some satisfactory reason, avoid bringing forward, or at least supporting, in the event of their changing places with the ins, — hence it is, that any such defalcation which they can in general prevail upon themselves to propose, will in general be either spurious and fallacious, or at best inadequate: — inadequate, — and by its inadequacy, and the virtual confession involved in it, giving support and confirmation to every portion of kindred abuse which it leaves untouched.

CHAPTER X.

DIFFERENT PARTS WHICH MAY BE BORNE IN RELATION TO FALLACIES.

As in the case of bad money, so in the case of bad arguments: in the sort and degree of currency which they experience, different persons acting so many different parts are distinguishable.

Fabricator, *utterer*, *acceptor*. these are the different parts acted in the currency given to a bad shilling: these are the parts acted on the occasion of the currency given to a bad argument.

In the case of a bad argument, he who is *fabricator* must be utterer likewise, or in general it would not make its appearance. But for one fabricator who is an utterer, there may be utterers in any number, no one of whom was fabricator.

In the case of the bad argument, as in the case of the bad shilling, in the instance of each actor, the mind is, with reference to the nature and tendency of the transaction, capable of bearing different aspects, which, for purposes of practical importance, it becomes material to distinguish:—

1. Evil consciousness (in the language of Roman lawyers, *dolus;* in the language of Roman, and thence of English lawyers, *mala fides:*) 2. Blameable ignorance or inattention, say, in one word, *Temerity*, (in the same language sometimes *culpa*, sometimes *temeritas:*) 3. Blameless agency, *actus;* which, notwithstanding any mischief that may have been the casual result of it, was free of blame: — by these several denominations are characterized so many habitudes, of which, with relation to any pernicious result, the mind is susceptible.

In the case of the argument, as in the case of the shilling, where the mind is in that state in which the charge of evil-consciousness may with propriety be made, that which the man is conscious of is, the badness of the article which he has in hand.

In general, it is in the case of the *fabricator* that the mind is least apt to be free from the imputation of evil-consciousness. Be it the bad shilling — be it the bad argument — the making of it will have cost more or less trouble; which trouble, generally speaking, the fabricator will not have taken but in the design of utterance, and in the expectation of making, by means of such utterance, some advantage. In the instance of the bad shilling, it is certain — in the instance of the bad argument, it is more or less probable (more probable in the case of the fabricator than in the case of the mere utterer) — that the badness of it was known and understood. It is certainly possible that the badness of the argument may never have been perceived by the fabricator, or that the bad argument may have been framed without any intention of applying it to bad purposes. But in general, the more a man is exposed to the action of sinister interest, the more reason there is for charging him with evil-consciousness, supposing him to be aware of the action of the sinister interest.

However the action of the sinister interest may have been either *perceived* or *unperceived* — for without a certain degree of attention, a man no more perceives what is passing in his own, than what is passing in other minds — the book that lies open before him, though it be the object nearest to him, and though he be ever so much in the habit of reading, may, even while two eyes are fixed upon it, be read or not read, according as it happens that circumstances have, or have not, called his attention to the contents.

The action of a sinister interest may have been *immediate* or *un-immediate*.

Immediate; it may have been perceived or not perceived: un-immediate; it has, almost to a certainty, been unperceived.

Sinister interest has two *media* through which it usually operates. These are *prejudice* and *authority*; and hence, we have for the immediate progeny of sinister interest, *interest-begotten* prejudice and *authority-begotten* prejudice.

In what case soever a bad argument has owed its fabrication or its utterance to sinister interest, and that interest is not, at the time of fabrication or utterance, perceived, it has for its immediate parent either *in-bred* prejudice or *authority*.

Of the three operations thus intimately connected — viz. *fabrication*, *utterance*, and *acceptance* — that the two first are capable of having *evil-consciousness* for their accompaniment, is obvious. As to acceptance, a distinction must be made before an answer can be given to the question, whether it is accompanied with evil-consciousness.

It may be distinguished into *interior* and *exterior*. Where the opinion, how false soever, is really believed to be true by the person to whom it has been presented, the acceptance given to it may be termed internal: where, whether by discourse, by deportment, or other tokens, a belief of its having experienced an internal acceptance at his hands is, with or without design on his part, entertained by other persons; in so far may it be said to have experienced at his hands an external acceptance.

In the natural state of things, both these modes of acceptance have place together: upon the *internal*, the *external* mode follows as a natural consequence. Either of them is, however, capable of having place without the other: feeling the force of an argument, I may appear as if I had not felt it; not having received any impression from it, I may appear as if I had received an impression of greater or less strength, whichever best suits my purpose.

It is sufficiently manifest, that evil-consciousness cannot be the accompaniment of internal acceptance; but it may be an accompaniment, and actually is the accompaniment of external acceptance, as often as the external has not for its accompaniment the internal acceptance.

Supposing the argument such that the appellation of fallacy is justly applicable to it, whatsoever part is borne in relation to it — viz. fabrication, utterance, or acceptance — may with propriety be ascribed to want of probity or want of intelligence.

Hitherto the distinction appears plain and broad enough; but upon a closer inspection, a sort of a mixed, or a middle state between that of evil-consciousness and that of pure temerity — between that of improbity and that of imbecility — may be observed.

This is where the persuasive force of the argument admits of different degrees — as when an argument, which operates with a certain degree of force on the utterer's mind, is, in the utterance given to it, represented as acting with a degree of force to any amount more considerable.

Thus, a man who considers his opinion as invested only with a certain degree of probability, may speak of it as of a matter of absolute certainty. The persuasion he thus expresses is not absolutely false, but it is exaggerated; and this exaggeration is a species of falsehood.

The more frequent the trumpeter of any fallacy is in its performance, the greater the progress which his mind is apt to make from the state of evil-consciousness to the state of temerity — from the state of improbity to the state of imbecility; that is, imbecility with respect to the subject-matter. It is said of gamblers, that they begin their career as dupes, and end as thieves: in the present case, the parties begin with craft, and end with delusion.

A phenomenon, the existence of which seems to be out of dispute, is that of a liar, by whom a lie of his own invention has so often been told as true, that at length it has come to be accepted as such even by himself.

But if such is the case with regard to a statement composed of words, every one of which finds itself in manifest contradiction to some determinate truth, it may be imagined how much more easily, and consequently how much more frequently, it may come to be the case, in regard to a statement of such nicety and delicacy, as that of the strength of the impression made by this or that instrument of persuasion, of which the persuasive force is susceptible of innumerable degrees, no one of which has ever yet been distinguished from any other, by any externally sensible signs or tokens, in the form of discourse or otherwise.

If substitution of irrelevant arguments to relevant ones is evidence of a bad cause, and of consciousness of the badness of that bad cause, much more is the substitution of application made to the *will*, to applications made to the *understanding*: — of the matter of punishment or reward, to the matter of argument.

Arguments addressed to the understanding may, if fallacious, be answered; and any mischief they had a tendency to produce, be prevented by counter-arguments addressed to the understanding.

Against arguments addressed to the will, those addressed to the understanding are altogether without effect, and the mischief produced by them is without remedy.

CHAPTER XI.

USES OF THE PRECEDING EXPOSURE.

BUT of these disquisitions concerning the state and character of the mind of those by whom these instruments of deception are employed, what, it may be asked, is the practical use?

The use is, the opposing such check as it may be in the power of reason to apply, to the practice of employing these poisoned weapons. In proportion as the virtue of sincerity is an object of love and veneration, the opposite vice is held in abhorrence: — the more generally and intimately the public in general are satisfied of the insincerity of him by whom the arguments in question are employed, in that same proportion will be the efficiency of the motives by the force of which a man is withheld from employing these arguments.

Suppose the deceptious and pernicious tendency of these arguments, and thence the improbity of him who employs them, in such sort held up to view as to find the minds of men sufficiently sensible of it — and suppose, that in the public mind in general, virtue in the form of sincerity is an object of respect, vice in the opposite form an object of aversion and contempt, — the practice of this species of improbity will become as rare, as is the practice of any other species of improbity to which the restrictive action of the same moral power is in the habit of applying itself with the same force.

If, on this occasion, the object were to prove the deceptious nature and inconclusiveness of these arguments, the exposure thus given of the mental character of the persons by whom they are employed, would not have any just title to be received into the body of evidence applicable to this purpose. Be the improbity of the persons by whom these arguments are employed ever so glaring, the arguments themselves are exactly what they are — neither better nor worse. To employ as a medium of proof for demonstrating the impropriety of the arguments, the improbity of him by whom they are uttered, is an expedient which stands itself upon the list of *fallacies*, and which in the foregoing pages has been brought to view.

But on the present occasion, and for the present purpose, the impropriety as well as the mischievousness of these arguments is supposed to be sufficiently established on other, and those unexceptionable, grounds: the object in view now is, to determine by what means an object so desirable as the general disuse of these poisonous weapons may in the completest and most effectual degree be attained.

Now, the mere *utterance* of these base arguments is not the only — it is not so much as the principal mischief in the case. It is the reception of them in the character of conclusive or influential arguments that constitutes the principal and only ultimate mischief. To the object of making men ashamed to utter them, must therefore be added, the ulterior object of making men ashamed to receive them — ashamed as often as they are observed to see or hear them — ashamed to be known to turn towards them any other aspect than that of aversion and contempt.

But if the practice of insincerity be a practice which a man ought to be ashamed of, so is the practice of giving encouragement to — of forbearing to oppose discouragement to that vice: and to this same desirable and useful end does that man most contribute, by whom the immorality of the practice is held up to view in the strongest and clearest colours.

Nor, upon reflection, will the result be found so hopeless as at first sight might be supposed. In the most numerous assembly that ever sat in either House, perhaps, not a single individual could be found, by whom, in the company of a chaste and well-bred female, an obscene word was ever uttered. And if the frown of indignation were as sure to be drawn down upon the offender by an offence against this branch of the law of probity as by an offence against the law of delicacy, transgression would not be less effectually banished from both those great public theatres, than it is already from the domestic circle.

If, of the fallacies in question, the tendency be really pernicious, — whosoever he be, who by lawful and unexceptionable means of any kind shall have contributed to this effect, will thereby have rendered to his country and to mankind good service.

But whosoever he be, who to the intellectual power adds the moderate portion of pecuniary power necessary, in his power it lies completely to render this good service.

In any printed report of the debates of the assembly in question, supposing any such instruments of deception discoverable, in each instance in which any such instrument is discoverable, let him, at the bottom of the page, by the help of the usual marks of reference, give intimation of it: describing it, for instance, if it be of the number of those which are included in the present list, by the name by which it stands designated in this list, or by any more apt and clearly designative denomination that can be found for it.

The want of sufficient time for adequate discussion, when carried on orally in a numerous assembly, has in no inconsiderable extent been held out by experience in the character of a real and serious evil. To this evil, the table of fallacies furnishes, to an indefinite extent, a powerful remedy.

There are few men of the class of those who read, to whose memory Goldsmith's delightful novel, the Vicar of Wakefield, is not more or less present. Among the disasters into which the good Vicar is betrayed by his simplicity, is the loss inflicted on him by the craft of Ephraim Jenkins. For insinuating himself into the good opinion and confidence of men of more learning than caution, the instrument he had formed to himself consisted apparently of an extempore sample of recondite learning, in which, in the character of the subject, the cosmogony, and in the character of one of the historians, Sanchoniathon, were the principal figures. On one or two of the occasions on which it was put to use, the success corresponded with the design, and Ephraim remained undetected and triumphant. But at last, as the devil by his cloven foot, so was Ephraim, though in a fresh disguise, betrayed by the cosmogony and Sanchoniathon, to some persons to whose lot it had fallen to receive the same proof of recondite learning, word for word. Immediately the chamber rings, with — "*Your servant, Mr. Ephraim!*"

In the course of time, when these imperfect sketches shall have received perfection and polish from some more skilful hand, so shall it be done unto him (nor is there need of inspiration for the prophecy) — so shall it be done unto him, who in the tabernacle of St. Stephen's, or in any other mansion, higher or lower, of similar design and use, shall be so far off his guard, as through craft or simplicity to let drop any of these irrelevant, and at one time deceptious arguments: and instead of, Order! Order! a voice shall be heard, followed, if need be, by voices in scores, crying aloud, "Stale! Stale! Fallacy of authority! Fallacy of distrust!" &c. &c.

The faculty which detection has of divesting deception of her power, is attested by the poet: —

"Quære *peregrinum*, vicinia rauca reclamat."

The period of time at which, in the instance of the instruments of deception here in question, this change shall have been acknowledged to have been completely effected, will form an epoch in the history of civilization.

ANARCHICAL FALLACIES;

BEING

AN EXAMINATION

OF

THE DECLARATIONS OF RIGHTS

ISSUED DURING

THE FRENCH REVOLUTION.

BY

JEREMY BENTHAM.

ADVERTISEMENT.

THE following papers are now first published in English, from Mr. Bentham's MSS.; the substance of them has previously been published in French by Dumont.

AN EXAMINATION OF THE DECLARATION

OF THE

RIGHTS OF THE MAN AND THE CITIZEN

DECREED BY THE

CONSTITUENT ASSEMBLY IN FRANCE.

PREAMBLE.

"THE Representatives of the French people, constituted in National Assembly, considering that ignorance, forgetfulness, or contempt of the Rights of Man, are the only causes of public calamities, and of the corruption of governments, have resolved to set forth in a solemn declaration, the natural, unalienable, and sacred rights of man, in order that this declaration, constantly presented to all the members of the body social, may recall to mind, without ceasing, their rights and their duties; to the end, that the acts of the legislative power, and those of the executive power, being capable at every instant of comparison with the end of every political institution, they may be more respected, and also that the demands of the citizens hereafter, founded upon simple and incontestable principles, may always tend to the maintenance of the constitution and to the happiness of all."

"In consequence, the National Assembly acknowledges and declares, in the presence and under the auspices of the Supreme Being, the following Rights of the Man and the Citizen."—

From this preamble we may collect the following positions: —

1. That the declaration in question ought to include a declaration of all the powers which it is designed should thereafter subsist in the State; the limits of each power precisely laid down, and every one completely distinguished from the other.

2. That the articles by which this is to be done, ought not to be loose and scattered, but closely connected into a whole, and the connexion all along made visible.

3. That the declaration of the rights of man, in a state preceding that of political society, ought to form a part of the composition in question, and constitute the first part of it.

4. That in point of fact, a clear idea of all these stands already imprinted in the minds of every man

5. That, therefore, the object of such a draught is not, in any part of such a draught, to teach the people anything new.

6. But that the object of such a declaration is to declare the accession of the Assembly, as such, to the principles as understood and embraced, as well by themselves in their individual capacity, as by all other individuals in the State.

7. That the use of this solemn adoption and recognition is, that the principles recognised may serve as a standard by which the propriety of the several particular laws that are afterwards to be enacted in consequence, may be tried.

8. That by the conformity of these laws to this standard, the fidelity of the legislators to their trust is also to be tried.

9. That accordingly, if any law should hereafter be enacted, between which, and any of those fundamental articles, any want of conformity in any point can be pointed out, such want of conformity will be a conclusive proof of two things: 1. Of the impropriety of such law; 2. Of error or criminality on the part of the authors and adopters of that law.

It concerns me to see so respectable an Assembly hold out expectations, which, according to my conception, cannot in the nature of things be fulfilled.

An enterprise of this sort, instead of preceding the formation of a complete body of laws, supposes such a work to be already existing in every particular except that of its obligatory force.

No laws are ever to receive the sanction of the Assembly that shall be contrary in any point to these principles. What does this suppose? It supposes the several articles of detail that require to be enacted, to have been drawn up, to have been passed in review, to have been confronted with these fundamental articles, and to have been found in no respect

repugnant to them. In a word, to be sufficiently assured that the several laws of detail will bear this trying comparison, one thing is necessary: the comparison must have been made.

To know the several laws which the exigencies of mankind call for, a view of all these several exigencies must be obtained. But to obtain this view, there is but one possible means, which is, to take a view of the laws that have already been framed, and of the exigencies which have given birth to them.

To frame a composition which shall in any tolerable degree answer this requisition, two endowments, it is evident, are absolutely necessary: — an acquaintance with the law as it is, and the perspicuity and genius of the metaphysician: and these endowments must unite in the same person.

I can conceive but four purposes which a discourse, of the kind proposed under the name of a Declaration of Rights, can be intended to answer:—the setting bounds to the authority of the crown; — the setting bounds to the authority of the supreme legislative power, that of the National Assembly; — the serving as a general guide or set of instructions to the National Assembly itself, in the task of executing their function in detail, by the establishment of particular laws; — and the affording a satisfaction to the people.

These four purposes seem, if I apprehend right, to be all of them avowed by the same or different advocates for this measure.

Of the fourth and last of these purposes I shall say nothing: it is a question merely local — dependent upon the humour of the spot and of the day, of which no one at a distance can be a judge. Of the fitness of the end, there can be but one opinion: the only question is about the fitness of the means.

In the three other points of view, the expediency of the measure is more than I can perceive.

The description of the persons, of whose rights it is to contain the declaration, is remarkable. Who are they? The French nation? No; not they only, but all citizens, and all men. By citizens, it seems we are to understand men engaged in political society: by men, persons not yet engaged in political society — persons as yet in a state of nature.

The word men, as opposed to citizens, I had rather not have seen. In this sense, a declaration of the rights of men is a declaration of the rights which human creatures, it is supposed, would possess, were they in a state in which the French nation certainly are not, nor perhaps any other; certainly no other into whose hands this declaration could ever come.

This instrument is the more worthy of attention, especially of the attention of a foreigner, inasmuch as the rights which it is to declare are the rights which it is supposed belong to the members of every nation in the globe. As a member of a nation which with relation to the French comes under the name of a foreign one, I feel the stronger call to examine this declaration, inasmuch as in this instrument I am invited to read a list of rights which belong as much to me as to the people for whose more particular use it has been framed.

The word men, I observe to be all along coupled in the language of the Assembly itself, with the word citizen. I lay it, therefore, out of the question, and consider the declaration in the same light in which it is viewed by M. Turgot, as that of a declaration of the rights of all men in a state of citizenship or political society.

I proceed, then, to consider it in the three points of view above announced: —

1. Can it be of use for the purpose of setting bounds to the power of the crown? No; for that is to be the particular object of the Constitutional Code itself, from which this preliminary part is detached in advance.

2. Can it be of use for the purpose of setting bounds to the power of the several legislative bodies established or to be established? I answer, No.

(1.) Not of any subordinate ones: for of their authority, the natural and necessary limit is that of the supreme legislature, the National Assembly.

(2.) Not of the National Assembly itself:— Why? 1. Such limitation is unnecessary. It is proposed, and very wisely and honestly, to call in the body of the people, and give it as much power and influence as in its nature it is capable of: by enabling it to declare its sentiments whenever it thinks proper, whether immediately, or through the channel of the subordinate assemblies. Is a law enacted or proposed in the National Assembly, which happens not to be agreeable to the body of the people? It will be equally censured by them, whether it be conceived, or not, to bear marks of a repugnancy to this declaration of rights. Is a law disagreeable to them? They will hardly think themselves precluded from expressing their disapprobation, by the circumstance of its not being to be convicted of repugnancy to that instrument; and though it should be repugnant to that instrument, they will see little need to resort to that instrument for the ground of their repugnancy; they will find a much nearer ground in some particular real or imaginary inconvenience.

In short, when you have made such provision, that the supreme legislature can never carry any point against the general and persevering opinion of the people, what would you have more? What use in their attempting to bind themselves by a set of phrases

of their own contrivance? The people's pleasure: that is the only check to which no other can add anything, and which no other can supersede.

In regard to the rights thus declared, mention will either be made of the exceptions and modifications that may be made to them by the laws themselves, or there will not. In the former case, the observance of the declaration will be impracticable; nor can the law in its details stir a step without flying in the face of it. In the other case, it fails thereby altogether of its only object, the setting limits to the exercise of the legislative power. Suppose a declaration to this effect:—no man's liberty shall be abridged in any point. This, it is evident, would be an useless extravagance, which must be contradicted by every law that came to be made. Suppose it to say—no man's liberty shall be abridged, but in such points as it shall be abridged in, by the law. This, we see, is saying nothing: it leaves the law just as free and unfettered as it found it.

Between these two rocks lies the only choice which an instrument destined to this purpose can have. Is an instrument of this sort produced? We shall see it striking against one or other of them in every line. The first is what the framers will most guard against, in proportion to their reach of thought, and to their knowledge in this line: when they hit against the other, it will be by accident and unawares.

Lastly, it cannot with any good effect answer the only remaining intention, viz. that of a check to restrain as well as to guide the legislature itself, in the penning of the laws of detail that are to follow.

The mistake has its source in the current logic, and in the want of attention to the distinction between what is first in the order of demonstration, and what is first in the order of invention. Principles, it is said, ought to precede consequences; and the first being established, the others will follow of course. What are the principles here meant? General propositions, and those of the widest extent. What by consequences? Particular propositions, included under those general ones.

That this order is favourable to demonstration, if by demonstration be meant personal debate and argumentation, is true enough. Why? Because, if you can once get a man to admit the general proposition, he cannot, without incurring the reproach of inconsistency, reject a particular proposition that is included in it.

But, that this order is not the order of conception, of investigation, of invention, is equally undeniable. In this order, particular propositions always precede general ones. The assent to the latter is preceded by and grounded on the assent to the former.

If we prove the consequences from the principle, it is only from the consequences that we learn the principle.

Apply this to laws. The first business, according to the plan I am combating, is to find and declare the principles: the laws of a fundamental nature: that done, it is by their means that we shall be enabled to find the proper laws of detail. I say, no: it is only in proportion as we have formed and compared with one another the laws of detail, that our fundamental laws will be exact and fit for service. Is a general proposition true? It is because all the particular propositions that are included under it are true. How, then, are we to satisfy ourselves of the truth of the general one? By having under our eye all the included particular ones. What, then, is the order of investigation by which true general propositions are formed? We take a number of less extensive — of particular propositions; find some points in which they agree, and from the observation of these points form a more extensive one, a general one, in which they are all included. In this way, we proceed upon sure grounds, and understand ourselves as we go: in the opposite way, we proceed at random, and danger attends every step.

No law is good which does not add more to the general mass of felicity than it takes from it. No law ought to be made that does not add more to the general mass of felicity than it takes from it. No law can be made that does not take something from liberty; those excepted which take away, in the whole or in part those laws which take from liberty. Propositions to the first effect I see are true without any exception: propositions to the latter effect I see are not true till after the particular propositions intimated by the exceptions are taken out of it. These propositions I have attained a full satisfaction of the truth of. How? By the habit I have been in for a course of years, of taking any law at pleasure, and observing that the particular proposition relative to that law was always conformable to the fact announced by the general one.

So in the other example. I discerned in the first instance, in a faint way, that two classes would serve to comprehend all laws: laws which take from liberty in their immediate operation, and laws which in the same way destroy, in part or in the whole, the operation of the former. The perception was at first obscure, owing to the difficulty of ascertaining what constituted in every case a law, and of tracing out its operation. By repeated trials, I came at last to be able to show of any law which offered itself, that it came under one or other of those classes.

What follows? That the proper order is —first to digest the laws of detail, and when

they are settled and found to be fit for use, then, and not till then, to select and frame *in terminis*, by abstraction, such propositions as may be capable of being given without self-contradiction as fundamental laws.

What is the source of this premature anxiety to establish fundamental laws? It is the old conceit of being wiser than all posterity — wiser than those who will have had more experience, — the old desire of ruling over posterity — the old recipe for enabling the dead to chain down the living. In the case of a specific law, the absurdity of such a notion is pretty well recognised, yet there the absurdity is much less than here. Of a particular law, the nature may be fully comprehended — the consequences foreseen: of a general law, this is the less likely to be the case, the greater the degree in which it possesses the quality of a general one. By a law of which you are fully master, and see clearly to the extent of, you will not attempt to bind succeeding legislators: the law you pitch upon in preference for this purpose, is one which you are unable to see to the end of.

Ought no such general propositions, then, to be ever framed till after the establishment of a complete code? I do not mean to assert this; on the contrary, in morals as in physics, nothing is to be done without them. The more they are framed and tried, the better: only, when framed, they ought to be well tried before they are ushered abroad into the world in the character of laws. In that character they ought not to be exhibited till after they have been confronted with all the particular laws to which the force of them is to apply. But if the intention be to chain down the legislator, these will be all the laws without exception which are looked upon as proper to be inserted in the code. For the interdiction meant to be put upon him is unlimited: he is never to establish any law which shall disagree with the pattern cut out for him — which shall ever trench upon such and such rights.

Such indigested and premature establishments betoken two things: — the weakness of the understanding, and the violence of the passions: the weakness of the understanding, in not seeing the insuperable incongruities which have been above stated — the violence of the passions, which betake themselves to such weapons for subduing opposition at any rate, and giving to the will of every man who embraces the proposition imported by the article in question, a weight beyond what is its just and intrinsic due. In vain would man seek to cover his weakness by positive and assuming language: the expression of one opinion, the expression of one will, is the utmost that any proposition can amount to. Ought and ought not, can and can not, shall and shall not, all put together, can never amount to anything more. "No law ought to be made, which will lessen upon the whole the mass of general felicity." When I, a legislator or private citizen, say this, what is the simple matter of fact that is expressed? This, and this only, that a sentiment of dissatisfaction is excited in my breast by any such law. So again — "No law shall be made, which will lessen upon the whole the mass of general felicity." What does this signify? That the sentiment of dissatisfaction in me is so strong as to have given birth to a determined will that no such law should ever pass, and that determination so strong as to have produced a resolution on my part to oppose myself, as far as depends on me, to the passing of it, should it ever be attempted — a determination which is the more likely to meet with success, in proportion to the influence, which in the character of legislator or any other, my mind happens to possess over the minds of others.

"No law *can* be made which will do us above. What does this signify? The same will as before, only wrapped up in an absurd and insidious disguise. My will is here so strong, that, as a means of seeing it crowned with success, I use my influence with the persons concerned to persuade them to consider a law which, at the same time, I suppose to be made, in the same point of view as if it were not made; and consequently, to pay no more obedience to it than if it were the command of an unauthorized individual. To compass this design, I make the absurd choice of a term expressive in its original and proper import of a physical impossibility, in order to represent as impossible the very event of the occurrence of which I am apprehensive: — occupied with the contrary persuasion, I raise my voice to the people — tell them the thing is impossible; and they are to have the goodness to believe me, and act in consequence.

A law to the effect in question is a violation of the natural and indefeasible rights of man. What does this signify? That my resolution of using my utmost influence in opposition to such a law is wound up to such a pitch, that should any law be ever enacted, which in my eyes appears to come up to that description, my determination is, to behave to the persons concerned in its enactment, as any man would behave towards those who had been guilty of a notorious and violent infraction of his rights. If necessary, I would corporally oppose them — if necessary, in short, I would endeavour to kill them; just as, to save my own life, I would endeavour to kill any one who was endeavouring to kill me.

These several contrivances for giving to an increase in vehemence, the effect of an increase in strength of argument, may be styled *bawling* upon paper: it proceeds from

the same temper and the same sort of distress as produces bawling with the voice.

That they should be such efficacious recipes is much to be regretted; that they will always be but too much so, is much to be apprehended; but that they will be less and less so, as intelligence spreads and reason matures, is devoutly to be wished, and not unreasonably to be hoped for.

As passions are contagious, and the bulk of men are more guided by the opinions and pretended opinions of others than by their own, a large share of confidence, with a little share of argument, will be apt to go farther than all the argument in the world without confidence: and hence it is, that modes of expression like these, which owe the influence they unhappily possess to the confidence they display, have met with such general reception. That they should fall into discredit, is, if the reasons above given have any force, devoutly to be wished: and for the accomplishing this good end, there cannot be any method so effectual — or rather, there cannot be any other method, than that of unmasking them in the manner here attempted.

The phrases *can* and *can not*, are employed in this way with greater and more pernicious effect, inasmuch as, over and above physical and moral impossibility, they are made use of with much less impropriety and violence to denote legal impossibility. In the language of the law, speaking in the character of the law, they are used in this way without ambiguity or inconvenience. "Such a magistrate cannot do so and so," that is, he has no power to do so and so. If he issue a command to such an effect, it is no more to be obeyed than if it issued from any private person. But when the same expression is applied to the very power which is acknowledged to be supreme, and not limited by any specific institution, clouds of ambiguity and confusion roll on in a torrent almost impossible to be withstood. Shuffled backwards and forwards amidst these three species of impossibility — physical, legal, and moral — the mind can find no resting-place: it loses its footing altogether, and becomes an easy prey to the violence which wields these arms.

The expedient is the more powerful, inasmuch as, where it does not succeed so far as to gain a man and carry him over to that side, it will perplex him and prevent his finding his way to the other: it will leave him neutral, though it should fail of making him a friend.

It is the better calculated to produce this effect, inasmuch as nothing can tend more powerfully to draw a man altogether out of the track of reason and out of sight of utility, the only just standard for trying all sorts of moral questions. Of a positive assertion thus irrational, the natural effect, where it fails of producing irrational acquiescence, is to produce equally irrational denial, by which no light is thrown upon the subject, nor any opening pointed out through which light may come. I say, the law cannot do so and so; you say, it can. When we have said thus much on each side, it is to no purpose to say more; there we are completely at a stand: argument such as this can go no further on either side, — or neither yields, — or passion triumphs alone — the stronger sweeping the weaker away.

Change the language, and instead of *cannot*, put *ought not*, — the case is widely different. The moderate expression of opinion and will intimated by this phrase, leads naturally to the inquiry after a reason: — and this reason, if there be any at bottom that deserves the name, is always a proposition of fact relative to the question of utility. Such a law *ought not* to be established, because it is not consistent with the general welfare — its tendency is not to add to the general stock of happiness. I say, it ought not to be established; that is, I do not approve of its being established: the emotion excited in my mind by the idea of its establishment, is not that of satisfaction, but the contrary. How happens this? Because the production of inconvenience, more than equivalent to any advantage that will ensue, presents itself to my conception in the character of a probable event. Now the question is put, as every political and moral question ought to be, upon the issue of fact; and mankind are directed into the only true track of investigation which can afford instruction or hope of rational argument, the track of experiment and observation. Agreement, to be sure, is not even then made certain: — for certainty belongs not to human affairs. But the track, which of all others bids fairest for leading to agreement, is pointed out: a clue for bringing back the travellers, in case of doubt or difficulty, is presented; and, at any rate, they are not struck motionless at the first step.

Nothing would be more unjust or more foreign to my design, than taking occasion, from anything that has been said, to throw particular blame upon particular persons: reproach which strikes everybody, hurts nobody; and common error, where it does not, according to the maxim of English law, produce common right, is productive at least of common exculpation.

A CRITICAL EXAMINATION

OF THE

DECLARATION OF RIGHTS.

PRELIMINARY OBSERVATIONS.

THE Declaration of Rights — I mean the paper published under that name by the French National Assembly in 1791 — assumes for its subject-matter a field of disquisition as unbounded in point of extent as it is important in its nature. But the more ample the extent given to any proposition or string of propositions, the more difficult it is to keep the import of it confined without deviation, within the bounds of truth and reason. If in the smallest corners of the field it ranges over, it fail of coinciding with the line of rigid rectitude, no sooner is the aberration pointed out, than (inasmuch as there is no medium between truth and falsehood) its pretensions to the appellation of a truism are gone, and whoever looks upon it must recognise it to be false and erroneous, — and if, as here, political conduct be the theme, so far as the error extends and fails of being detected, pernicious.

In a work of such extreme importance with a view to practice, and which throughout keeps practice so closely and immediately and professedly in view, a single error may be attended with the most fatal consequences. The more extensive the propositions, the more consummate will be the knowledge, the more exquisite the skill, indispensably requisite to confine them in all points within the pale of truth. The most consummate ability in the whole nation could not have been too much for the task — one may venture to say, it would not have been equal to it. But that, in the sanctioning of each proposition, the most consummate ability should happen to be vested in the heads of the sorry majority in whose hands the plenitude of power happened on that same occasion to be vested, is an event against which the chances are almost as infinity to one.

Here, then, is a radical and all-pervading error — the attempting to give to a work on such a subject the sanction of government; especially of such a government — a government composed of members so numerous, so unequal in talent, as well as discordant in inclinations and affections. Had it been the work of a single hand, and that a private one, and in that character given to the world, every good effect would have been produced by it that could be produced by it when published as the work of government, without any of the bad effects which in case of the smallest error must result from it when given as the work of government.

The revolution, which threw the government into the hands of the penners and adopters of this declaration, having been the effect of insurrection, the grand object evidently is to justify the cause. But by justifying it, they invite it: in justifying past insurrection, they plant and cultivate a propensity to perpetual insurrection in time future; they sow the seeds of anarchy broad-cast: in justifying the demolition of existing authorities, they undermine all future ones, their own consequently in the number. Shallow and reckless vanity! — They imitate in their conduct the author of that fabled law, according to which the assassination of the prince upon the throne gave to the assassin a title to succeed him. "*People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties.*" Such is the constant language, for such is the professed object of this source and model of all laws — this self-consecrated oracle of all nations.

The more *abstract* — that is, the more *extensive* the proposition is, the more liable is it to involve a fallacy. Of fallacies, one of the most natural modifications is that which is called *begging the question* — the abuse of making the abstract proposition resorted to for proof, a lever for introducing, in the company of *other* propositions that are nothing to the purpose, the very proposition which is admitted to stand in need of proof.

Is the provision in question fit in point of expediency to be passed into a law for the government of the French nation? That, *mutatis mutandis*, would have been the question put in England: that was the proper question to have been put in relation to each provision it was proposed should enter into the composition of the body of French laws.

Instead of that, as often as the utility of a provision appeared (by reason of the wideness of its extent, for instance) of a doubtful nature, the way taken to clear the doubt was to assert it to be a provision fit to be made law for all men — for all Frenchmen — and for all Englishmen, for example, into the bargain. This medium of proof was the more alluring, inasmuch as to the advantage of removing opposition, was added the pleasure, the sort of titillation so exquisite to the nerve of vanity in a French heart — the satisfaction, to use a homely, but not the less apposite proverb, of teaching grandmothers to suck eggs. Hark! ye citizens of the other side of the water! Can you tell us what rights you have belonging to you? No, that you can't. It's *we* that understand rights: not our own only, but yours into the bargain; while you, poor simple souls! know nothing about the matter.

Hasty generalization, the great stumbling-block of intellectual vanity! — hasty generalization, the rock that even genius itself is so apt to split upon! — hasty generalization, the bane of prudence and of science!

In the British Houses of Parliament, more especially in the most efficient house for business, there prevails a well-known jealousy of, and repugnance to, the voting of abstract propositions. This jealousy is not less general than reasonable. A jealousy of abstract propositions is an aversion to whatever is beside the purpose — an aversion to impertinence.

The great enemies of public peace are the selfish and dissocial passions: — necessary as they are — the one to the very existence of each individual, the other to his security. On the part of these affections, a deficiency in point of strength is never to be apprehended: all that is to be apprehended in respect of them, is to be apprehended on the side of their excess. Society is held together only by the sacrifices that men can be induced to make of the gratifications they demand: to obtain these sacrifices is the great difficulty, the great task of government. What has been the object, the perpetual and palpable object, of this declaration of pretended rights? To add as much force as possible to these passions, already but too strong, — to burst the cords that hold them in, — to say to the selfish passions, there — everywhere — is your prey! — to the angry passions, there — everywhere — is your enemy.

Such is the morality of this celebrated manifesto, rendered famous by the same qualities that gave celebrity to the incendiary of the Ephesian temple.

The logic of it is of a piece with its morality: — a perpetual vein of nonsense, flowing from a perpetual abuse of words, — words having a variety of meanings, where words with single meanings were equally at hand — the same words used in a variety of meanings in the same page, — words used in meanings not their own, where proper words were equally at hand, — words and propositions of the most unbounded signification, turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be; — the same inaccuracy, the same inattention in the penning of this cluster of truths on which the fate of nations was to hang, as if it had been an oriental tale, or an allegory for a magazine: — stale epigrams, instead of necessary distinctions, — figurative expressions preferred to simple ones, — sentimental conceits, as trite as they are unmeaning, preferred to apt and precise expressions, — frippery ornament preferred to the majestic simplicity of good sound sense, — and the acts of the senate loaded and disfigured by the tinsel of the playhouse.

In a play or a novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws — especially of laws given as constitutional and fundamental ones — an improper word may be a national calamity: — and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers.

Imputations like these may appear general and declamatory — and rightly so, if they stood alone: but they will be justified even to satiety by the details that follow. Scarcely an article, which in rummaging it, will not be found a true Pandora's box.

In running over the several articles, I shall on the occasion of each article point out, in the first place, the errors it contains in theory; and then, in the second place, the mischiefs it is pregnant with in practice.

The criticism is verbal: — true, but what else can it be? Words — words without a meaning, or with a meaning too flatly false to be maintained by anybody, are the stuff it is made of. Look to the letter, you find nonsense — look beyond the letter, you find nothing.

ARTICLE I.

Men [all men] are born and remain free, and equal in respect of rights. Social distinctions cannot be founded, but upon common utility.

In this article are contained, grammatically speaking, two distinct sentences. The first is full of error, the other of ambiguity.

In the first are contained four distinguishable propositions, all of them false — all of them notoriously and undeniably false: —

1. That all men are born free.
2. That all men remain free.

3. That all men are born equal in rights.

4. That all men remain (*i. e.* remain for ever, for the proposition is indefinite and unlimited) equal in rights.

All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection — the subjection of a helpless child to the parents on whom he depends every moment for his existence. In this subjection every man is born — in this subjection he continues for years—for a great number of years — and the existence of the individual and of the species depends upon his so doing.

What is the state of things to which the supposed existence of these supposed rights is meant to bear reference? — a state of things prior to the existence of government, or a state of things subsequent to the existence of government? If to a state prior to the existence of government, what would the existence of such rights as these be to the purpose, even if it were true, in any country where there is such a thing as government? If to a state of things subsequent to the formation of government—if in a country where there is a government, in what single instance —in the instance of what single government, is it true? Setting aside the case of parent and child, let any man name that single government under which any such equality is recognised.

All men born free? Absurd and miserable nonsense! When the great complaint—a complaint made perhaps by the very same people at the same time, is—that so many men are born slaves. Oh! but when we acknowledge them to be born slaves, we refer to the laws in being; which laws being void, as being contrary to those laws of nature which are the efficient causes of those rights of man that we are declaring, the men in question are free in one sense, though slaves in another; — slaves, and free, at the same time: — free in respect of the laws of nature — slaves in respect of the pretended human laws, which, though called laws, are no laws at all, as being contrary to the laws of nature. For such is the difference—the great and perpetual difference, betwixt the good subject, the rational censor of the laws, and the anarchist — between the moderate man and the man of violence. The rational censor, acknowledging the existence of the law he disapproves, proposes the repeal of it: the anarchist, setting up his will and fancy for a law before which all mankind are called upon to bow down at the first word — the anarchist, trampling on truth and decency, denies the validity of the law in question, — denies the existence of it in the character of a law, and calls upon all mankind to rise up in a mass, and resist the execution of it.

Whatever is, is, — was the maxim of Des-Cartes, who looked upon it as so sure, as well as so instructive a truth, that everything else which goes by the name of truth might be deduced from it. The philosophical vortex-maker—who, however mistaken in his philosophy and his logic, was harmless enough at least — the manufacturer of identical propositions and celestial vortices — little thought how soon a part of his own countrymen, fraught with pretensions as empty as his own, and as mischievous as his were innocent, would contest with him even this his favourite and fundamental maxim, by which everything else was to be brought to light. *Whatever is, is not* — is the maxim of the anarchist, as often as anything comes across him in the shape of a law which he happens not to like.

"Cruel is the judge," says Lord Bacon, "who, in order to enable himself to torture men, applies torture to the law." Still more cruel is the anarchist, who, for the purpose of effecting the subversion of the laws themselves, as well as the massacre of the legislators, tortures not only the words of the law, but the very vitals of the language.

All men are born equal in rights. The rights of the heir of the most indigent family equal to the rights of the heir of the most wealthy? In what case is this true? I say nothing of hereditary *dignities* and *powers*. Inequalities such as these being proscribed under and by the French government in France, are consequently proscribed by that government under every other government, and consequently have no existence anywhere. For the total subjection of every other government to French government, is a fundamental principle in the law of universal independence — the French law. Yet neither was this true at the time of issuing this Declaration of Rights, nor was it meant to be so afterwards. The 13th article, which we shall come to in its place, proceeds on the contrary supposition: for, considering its other attributes, inconsistency could not be wanting to the list. It can scarcely be more hostile to all other laws than it is at variance with itself.

All men (*i. e.* all human creatures of both sexes) *remain equal in rights.* All men, meaning doubtless all human creatures. The apprentice, then, is equal in rights to his master; he has as much liberty with relation to the master, as the master has with relation to him; he has as much right to command and to punish him; he is as much owner and master of the master's house, as the master himself. The case is the same as between ward and guardian. So again as between wife and husband. The madman has as good a right to confine anybody else, as anybody else has to confine him. The idiot has as much right to govern everybody, as anybody can have to govern him. The physician and the nurse, when called in by the next friend

of a sick man seized with a delirium, have no more right to prevent his throwing himself out of the window, than he has to throw them out of it. All this is plainly and incontestably included in this article of the Declaration of Rights: in the very words of it, and in the meaning — if it have any meaning. Was this the meaning of the authors of it?—or did they mean to admit this explanation as to some of the instances, and to explain the article away as to the rest? Not being idiots, nor lunatics, nor under a delirium, they would explain it away with regard to the madman, and the man under a delirium. Considering that a child may become an orphan as soon as it has seen the light, and that in that case, if not subject to government, it must perish, they would explain it away, I think, and contradict themselves, in the case of guardian and ward. In the case of master and apprentice, I would not take upon me to decide: it may have been their meaning to proscribe that relation altogether;—at least, this may have been the case, as soon as the repugnancy between that institution and this oracle was pointed out; for the professed object and destination of it is to be the standard of truth and falsehood, of right and wrong, in everything that relates to government. But to this standard, and to this article of it, the subjection of the apprentice to the master is flatly and diametrically repugnant. If it do not proscribe and exclude this inequality, it proscribes none: if it do not do this mischief, it does nothing.

So, again, in the case of husband and wife. Amongst the other abuses which the oracle was meant to put an end to, may, for aught I can pretend to say, have been the institution of marriage. For what is the subjection of a small and limited number of years, in comparison of the subjection of a whole life? Yet without subjection and inequality, no such institution can by any possibility take place; for of two contradictory wills, both cannot take effect at the same time.

The same doubts apply to the case of master and hired servant. Better a man should starve than hire himself; — better half the species starve, than hire itself out to service. For, where is the compatibility between liberty and servitude? How can liberty and servitude subsist in the same person? What good citizen is there, that would hesitate to die for liberty? And, as to those who are not good citizens, what matters it whether they live or starve? Besides that every man who lives under this constitution being equal in rights, equal in all sorts of rights, is equal in respect to rights of property. No man, therefore, can be in any danger of starving — no man can have so much as that motive, weak and inadequate as it is, for hiring himself out to service.

Sentence 2. *Social distinctions cannot be founded but upon common utility.* — This proposition has two or three meanings. According to one of them, the proposition is notoriously false: according to another, it is in contradiction to the four propositions that preceded it in the same sentence.

What is meant by *social distinctions?* what is meant by *can?* what is meant by *founded?*

What is meant by *social distinctions?* — Distinctions not respecting equality?— then these are nothing to the purpose. Distinctions in respect of equality? — then, consistently with the preceding propositions in this same article, they can have no existence: not existing, they cannot be founded upon anything. The distinctions above exemplified, are they in the number of the social distinctions here intended? Not one of them (as we have been seeing,) but has subjection — not one of them, but has inequality for its very essence.

What is meant by *can*—can not be founded but upon common utility? Is it meant to speak of what *is* established, or of what *ought to be established?* Does it mean that no social distinctions, but those which it approves as having the foundation in question, are established anywhere? or simply that none such *ought to be* established anywhere? or that, if the establishment or maintenance of such dispositions by the laws be attempted anywhere, such laws ought to be treated as void, and the attempt to execute them to be resisted? For such is the venom that lurks under such words as *can* and *can not*, when set up as a check upon the laws,—they contain all these three so perfectly distinct and widely different meanings. In the first, the proposition they are inserted into refers to practice, and makes appeal to observation — to the observation of other men, in regard to a matter of fact: in the second, it is an appeal to the approving faculty of others, in regard to the same matter of fact: in the third, it is no appeal to anything, or to anybody, but a violent attempt upon the liberty of speech and action on the part of others, by the terrors of anarchical despotism, rising up in opposition to the laws: it is an attempt to lift the dagger of the assassin against all individuals who presume to hold an opinion different from that of the orator or the writer, and against all governments which presume to support any such individuals in any such presumption. In the first of these imports, the proposition is perfectly harmless: but it is commonly so untrue, so glaringly untrue, so palpably untrue, even to drivelling, that it must be plain to everybody it can never have been the meaning that was intended.

In the second of these imports, the proposition may be true or not, as it may happen, and at any rate is equally innocent: but it is

such as will not answer the purpose; for an opinion that leaves others at liberty to be of a contrary one, will never answer the purpose of the passions: and if this had been the meaning intended, not this ambiguous phraseology, but a clear and simple one, presenting this meaning and no other, would have been employed. The third, which may not improperly be termed the *ruffian-like* or threatening import, is the meaning intended to be presented to the weak and timid, while the two innocent ones, of which one may even be reasonable, are held up before it as a veil to blind the eyes of the discerning reader, and screen from him the mischief that lurks beneath.

Can and *can not*, when thus applied — *can* and *can not*, when used instead of *ought* and *ought not* — *can* and *can not*, when applied to the binding force and effect of laws — not of the acts of individuals, nor yet of the acts of subordinate authority, but of the acts of the supreme government itself, are the disguised cant of the assassin: after them there is nothing but *do him*, betwixt the preparation for murder and the attempt. They resemble that instrument which in outward appearance is but an ordinary staff, but which within that simple and innocent semblance conceals a dagger. These are the words that speak daggers—if daggers can be spoken: they speak daggers, and there remains nothing but to use them.

Look where I will, I see but too many laws, the alteration or abolition of which, would in my poor judgment be a public blessing. I can conceive some, —to put extreme and scarcely exampled cases,—to which I might be inclined to oppose resistance, with a prospect of support such as promised to be effectual. But to talk of what the law, the supreme legislature of the country, acknowledged as such, *can* not do! — to talk of a *void* law as you would of a *void* order or a *void* judgment!— The very act of bringing such words into conjunction is either the vilest of nonsense, or the worst of treasons: — treason, not against one branch of the sovereignty, but against the whole: treason, not against this or that government, but against *all* governments.

ARTICLE II.

The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

Sentence 1. The end in view of every political association, is the preservation of the natural and imprescriptible rights of man.

More confusion — more nonsense, — and the nonsense, as usual, dangerous nonsense. The words can scarcely be said to have a meaning: but if they have, or rather if they had a meaning, these would be the propositions either asserted or implied: —

1. That there are such things as rights anterior to the establishment of governments: for natural, as applied to rights, if it mean anything, is meant to stand in opposition to *legal*; — to such rights as are acknowledged to owe their existence to government, and are consequently posterior in their date to the establishment of government.

2. That these rights *can not* be abrogated by government: for *can not* is implied in the form of the word imprescriptible, and the sense it wears when so applied, is the cut-throat sense above explained.

3. That the governments that exist derive their origin from formal associations, or what are now called *conventions:* associations entered into by a partnership contract, with all the members for partners,—entered into at a day prefixed, for a predetermined purpose, the formation of a new government where there was none before (for as to formal meetings holden under the controul of an existing government, they are evidently out of question here) in which it seems again to be implied in the way of inference, though a necessary and an unavoidable inference, that all governments (that is, self-called governments, knots of persons exercising the powers of government) that have had any other origin than an association of the above description, are illegal, that is, no governments at all; resistance to them, and subversion of them, lawful and commendable; and so on.

Such are the notions implied in this first part of the article. How stands the truth of things? That there are no such things as natural rights—no such things as rights anterior to the establishment of government—no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to that sort of error that leads to mischief — to the extremity of mischief.

We know what it is for men to live without government — and living without government, to live without rights: we know what it is for men to live without government, for we see instances of such a way of life — we see it in many savage nations, or rather races of mankind; for instance, among the savages of New South Wales, whose way of living is so well known to us: no habit of obedience, and thence no government — no government, and thence no laws — no laws, and thence no such things as rights — no security — no property: — liberty, as against regular controul, the controul of laws and government — perfect; but as against all irregular controul, the mandates of stronger individuals, none. In this state, at a time earlier than the com-

mencement of history — in this same state, judging from analogy, we, the inhabitants of the part of the globe we call Europe, were; — no government, consequently no rights: no rights, consequently no property — no legal security — no legal liberty: security not more than belongs to beasts — forecast and sense of insecurity keener — consequently in point of happiness below the level of the brutal race.

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; — a reason for wishing that a certain right were established, is not that right — want is not supply — hunger is not bread.

That which has no existence cannot be destroyed — that which cannot be destroyed cannot require anything to preserve it from destruction. *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights. And of these rights, whatever they are, there is not, it seems, any one of which any government *can*, upon any occasion whatever, abrogate the smallest particle.

So much for terrorist language. What is the language of reason and plain sense upon this same subject? That in proportion as it is *right* or *proper*, *i. e.* advantageous to the society in question, that this or that right — a right to this or that effect — should be established and maintained, in that same proportion it is *wrong* that it should be abrogated: but that as there is no *right*, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished. To know whether it would be more for the advantage of society that this or that right should be maintained or abolished, the time at which the question about maintaining or abolishing is proposed, must be given, and the circumstances under which it is proposed to maintain or abolish it; the right itself must be specifically described, not jumbled with an undistinguishable heap of others, under any such vague general terms as property, liberty, and the like.

One thing, in the midst of all this confusion, is but too plain. They know not of what they are talking under the name of natural rights, and yet they would have them imprescriptible — proof against all the power of the laws — pregnant with occasions summoning the members of the community to rise up in resistance against the laws. What, then, was their object in declaring the existence of imprescriptible rights, and without specifying a single one by any such mark as it could be known by? This and no other — to excite and keep up a spirit of resistance to all laws — a spirit of insurrection against all governments — against the governments of all other nations instantly, — against the government of their own nation — against the government they themselves were pretending to establish — even that, as soon as their own reign should be at an end. In us is the perfection of virtue and wisdom: in all mankind besides, the extremity of wickedness and folly. Our will shall consequently reign without controul, and for ever: reign now we are living — reign after we are dead.

All nations — all future ages — shall be, for they are predestined to be, our slaves.

Future governments will not have honesty enough to be trusted with the determination of what rights shall be maintained, what abrogated — what laws kept in force, what repealed. Future subjects (I should say future citizens, for French government does not admit of subjects) will not have wit enough to be trusted with the choice whether to submit to the determination of the government of their time, or to resist it. Governments, citizens — all to the end of time — all must be kept in chains.

Such are their maxims — such their premises — for it is by such premises only that the doctrine of imprescriptible rights and unrepealable laws can be supported.

What is the real source of these imprescriptible rights — these unrepealable laws? Power turned blind by looking from its own height: self-conceit and tyranny exalted into insanity. No man was to have any other man for a servant, yet all men were forever to be their slaves. Making laws with imposture in their mouths, under pretence of declaring them — giving for laws anything that came uppermost, and these unrepealable ones, on pretence of finding them ready made. Made by what? Not by a God — they allow of none; but by their goddess, Nature.

The origination of governments from a contract is a pure fiction, or in other words, a falsehood. It never has been known to be true in any instance; the allegation of it does mischief, by involving the subject in error and confusion, and is neither necessary nor useful to any good purpose.

All governments that we have any account of have been gradually established by habit, after having been formed by force; unless in the instance of governments formed by individuals who have been emancipated, or have emancipated themselves, from governments already formed, the governments under which

they were born — a rare case, and from which nothing follows with regard to the rest. What signifies it how governments are formed? Is it the less proper — the less conducive to the happiness of society — that the happiness of society should be the one object kept in view by the members of the government in all their measures? Is it the less the interest of men to be happy — less to be wished that they may be so — less the moral duty of their governors to make them so, as far as they can, at Mogadore than at Philadelphia?

Whence is it, but from government, that contracts derive their binding force? Contracts came from government, not government from contracts. It is from the habit of enforcing contracts, and seeing them enforced, that governments are chiefly indebted for whatever disposition they have to observe them.

Sentence 2. These rights [these imprescriptible as well as natural rights,] are liberty, property, security, and resistance to oppression.

Observe the extent of these pretended rights, each of them belonging to every man, and all of them without bounds. Unbounded liberty; that is, amongst other things, the liberty of doing or not doing on every occasion whatever each man pleases: — Unbounded property; that is, the right of doing with everything around him (with every *thing* at least, if not with every person,) whatsoever he pleases; communicating that right to anybody, and withholding it from anybody: — Unbounded security; that is, security for such his liberty, for such his property, and for his person, against every defalcation that can be called for on any account in respect of any of them: — Unbounded resistance to oppression; that is, unbounded exercise of the faculty of guarding himself against whatever unpleasant circumstance may present itself to his imagination or his passions under that name. Nature, say some of the interpreters of the pretended law of nature — nature gave to each man a right to everything; which is, in effect, but another way of saying — nature has given no such right to anybody; for in regard to most rights, it is as true that what is every man's right is no man's right, as that what is every man's business is no man's business. Nature gave — gave to every man a right to everything: — be it so — true; and hence the necessity of human government and human laws, to give to every man his own right, without which no right whatsoever would amount to anything. Nature gave every man a right to everything before the existence of laws, and in default of laws. This nominal universality and real nonentity of right, set up provisionally by nature in default of laws, the French oracle lays hold of, and perpetuates it under the law and in spite of laws. These anarchical rights which nature had set out with, democratic art attempts to rivet down, and declares indefeasible.

Unbounded liberty — I must still say unbounded liberty; — for though the next article but one returns to the charge, and gives such a definition of liberty as seems intended to set bounds to it, yet in effect the limitation amounts to nothing; and when, as here, no warning is given of any exception in the texture of the general rule, every exception which turns up is, not a confirmation but a contradiction of the rule: — liberty, without any pre-announced or intelligible bounds; and as to the other rights, they remain unbounded to the end: rights of man composed of a system of contradictions and impossibilities.

In vain would it be said, that though no bounds are here assigned to any of these rights, yet it is to be understood as taken for granted, and tacitly admitted and assumed, that they are to have bounds; viz. such bounds as it is understood will be set them by the laws. Vain, I say, would be this apology; for the supposition would be contradictory to the express declaration of the article itself, and would defeat the very object which the whole declaration has in view. It would be self-contradictory, because these rights are, in the same breath in which their existence is declared, declared to be imprescriptible; and imprescriptible, or, as we in England should say, indefeasible, means nothing unless it exclude the interference of the laws.

It would be not only inconsistent with itself, but inconsistent with the declared and sole object of the declaration, if it did not exclude the interference of the laws. It is against the laws themselves, and the laws only, that this declaration is levelled. It is for the hands of the legislator and all legislators, and none but legislators, that the shackles it provides are intended, — it is against the apprehended encroachments of legislators that the rights in question, the liberty and property, and so forth, are intended to be made secure, — it is to such encroachments, and damages, and dangers, that whatever security it professes to give has respect. Precious security for unbounded rights against legislators, if the extent of those rights in every direction were purposely left to depend upon the will and pleasure of those very legislators!

Nonsensical or nugatory, and in both cases mischievous: such is the alternative.

So much for all these pretended indefeasible rights in the lump: their inconsistency with each other, as well as the inconsistency of them in the character of indefeasible rights with the existence of government and all peaceable society, will appear still more plainly when we examine them one by one.

1. *Liberty*, then, is imprescriptible — in-

capable of being taken away — out of the power of any government ever to take away: liberty, — that is, every branch of liberty— every individual exercise of liberty; for no line is drawn — no distinction — no exception made. What these instructors as well as governors of mankind appear not to know, is, that all rights are made at the expense of liberty — all laws by which rights are created or confirmed. No right without a correspondent obligation. Liberty, as against the coercion of the law, may, it is true, be given by the simple removal of the obligation by which that coercion was applied — by the simple repeal of the coercing law. But as against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore (that is, all laws but constitutional laws, and laws repealing or modifying coercive laws,) and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty. Not here and there a law only — not this or that possible law, but almost all laws, are therefore repugnant to these natural and imprescriptible rights: consequently null and void, calling for resistance and insurrection, and so on, as before.

Laws creative of rights of property are also struck at by the same anathema. How is property given? By restraining liberty; that is, by taking it away so far as is necessary for the purpose. How is your house made yours? By debarring every one else from the liberty of entering it without your leave. But

2. *Property.* Property stands second on the list,—proprietary rights are in the number of the natural and imprescriptible rights of man — of the rights which a man is not indebted for to the laws, and which cannot be taken from him by the laws. Men — that is, every man (for a general expression given without exception is an universal one) has a right to property, to proprietary rights, *a right which* cannot be taken away from him by the laws. To proprietary rights. Good: but in relation to what subject? for as to proprietary rights — without a subject to which they are referable — without a subject in or in relation to which they can be exercised — they will hardly be of much value, they will hardly be worth taking care of, with so much solemnity. In vain would all the laws in the world have ascertained that I have a right to something. If this be all they have done for me—if there be no specific subject in relation to which my proprietary rights are established, I must either take what I want without right, or starve. As there is no such subject specified with relation to each man, or to any man (indeed how could there be?) the necessary inference (taking the passage literally) is, that every man has all manner of proprietary rights with relation to every subject of property without exception: in a word, that every man has a right to every thing. Unfortunately, in most matters of property, what is every man's right is no man's right; so that the effect of this part of the oracle, if observed, would be, not to establish property, but to extinguish it — to render it impossible ever to be revived: and this is one of the rights declared to be imprescriptible.

It will probably be acknowledged, that according to this construction, the clause in question is equally ruinous and absurd: — and hence the inference may be, that this was not the construction — this was not the meaning in view. But by the same rule, every possible construction which the words employed can admit of, might be proved not to have been the meaning in view: nor is this clause a whit more absurd or ruinous than all that goes before it, and a great deal of what comes after it. And, in short, if this be not the meaning of it, what is? Give it a sense — give it any sense whatever, — it is mischievous: — to save it from that imputation, there is but one course to take, which is to acknowledge it to be nonsense.

Thus much would be clear, if anything were clear in it, that according to this clause, whatever proprietary rights, whatever property a man once has, no matter how, being imprescriptible, can never be taken away from him by any law: or of what use or meaning is the clause? So that the moment it is acknowledged in relation to any article, that such article is my property, no matter how or when it became so, that moment it is acknowledged that it can never be taken away from me: therefore, for example, all laws and all judgments, whereby anything is taken away from me without my free consent — all taxes, for example, and all fines — are void, and, as such, call for resistance and insurrection, and so forth, as before.

3. *Security.* Security stands the third on the list of these natural and imprescriptible rights which laws did not give, and which laws are not in any degree to be suffered to take away. Under the head of security, liberty might have been included, so likewise property: since security for liberty, or the enjoyment of liberty, may be spoken of as a branch of security: — security for property, or the enjoyment of proprietary rights, as another. Security for person is the branch that seems here to have been understood: — security for each man's person, as against all those hurtful or disagreeable impressions (exclusive of those which consist in the mere disturbance of the enjoyment of liberty,) by which a man is affected in his person; loss of life — loss of limbs — loss of the use of limbs — wounds, bruises, and the like. All laws

are null and void, then, which on any account or in any manner seek to expose the person of any man to any risk — which appoint capital or other corporal punishment — which expose a man to personal hazard in the service of the military power against foreign enemies, or in that of the judicial power against delinquents: — all laws which, to preserve the country from pestilence, authorize the immediate execution of a suspected person, in the event of his transgressing certain bounds.

4. *Resistance to oppression.* Fourth and last in the list of natural and imprescriptible rights, resistance to oppression — meaning, I suppose, the right to resist oppression. What is oppression? Power misapplied to the prejudice of some individual. What is it that a man has in view when he speaks of oppression? Some exertion of power which he looks upon as misapplied to the prejudice of some individual — to the producing on the part of such individual some suffering, to which (whether as forbidden by the laws or otherwise) we conceive he ought not to have been subjected. But against everything that can come under the name of oppression, provision has been already made, in the manner we have seen, by the recognition of the three preceding rights; since no oppression can fall upon a man which is not an infringement of his rights in relation to liberty, rights in relation to property, or rights in relation to security, as above described. Where, then, is the difference? — to what purpose this fourth clause after the three first? To this purpose: the mischief they seek to prevent, the rights they seek to establish, are the same; the difference lies in the nature of the remedy endeavoured to be applied. To prevent the mischief in question, the endeavour of the three former clauses is, to tie the hand of the legislator and his subordinates, by the fear of nullity, and the remote apprehension of general resistance and insurrection. The aim of this fourth clause is to raise the hand of the individual concerned to prevent the apprehended infraction of his rights at the moment when he looks upon it as about to take place.

Whenever you are about to be oppressed, you have a right to resist oppression: whenever you conceive yourself to be oppressed, conceive yourself to have a right to make resistance, and act accordingly. In proportion as a law of any kind — any act of power, supreme or subordinate, legislative, administrative, or judicial, is unpleasant to a man, especially if, in consideration of such its unpleasantness, his opinion is, that such act of power ought not to have been exercised, he of course looks upon it as oppression: as often as anything of this sort happens to a man — as often as anything happens to a man to inflame his passions, — this article, for fear his passions should not be sufficiently inflamed of themselves, sets itself to work to blow the flame, and urges him to resistance. Submit not to any decree or other act of power, of the justice of which you are not yourself perfectly convinced. If a constable call upon you to serve in the militia, shoot the constable and not the enemy; — if the commander of a press-gang trouble you, push him into the sea — if a bailiff, throw him out of the window. If a judge sentence you to be imprisoned or put to death, have a dagger ready, and take a stroke first at the judge.

ARTICLE III.

The principle of every sovereignty [government] resides essentially in the nation. No body of men — no single individual — can exercise any authority which does not expressly issue from thence.

Of the two sentences of which this article is composed, the first is perfectly true, perfectly harmless, and perfectly uninstructive. Government and obedience go hand in hand. Where there is no obedience, there is no government; in proportion as obedience is paid, the powers of government are exercised. This is true under the broadest democracy: this is equally true under the most absolute monarchy. This can do no harm — can do no good, anywhere. I speak of its natural and obvious import taken by itself, and supposing the import of the word principle to be clear and unambiguous, as it is to be wished that it were, that is, taking it to mean *efficient cause.* Of power on the one part, obedience on the other is most certainly everywhere the efficient cause.

But being harmless, it would not answer the purpose, as delivered by the immediately succeeding sentence: being harmless, this meaning is not that which was in view. It is meant as an antecedent proposition, on which the next proposition is grounded in the character of a consequent. No body of men, no individual, can exercise any authority which does not issue from the nation in an express manner. *Can* — still the ambiguous and envenomed *can.* What cannot they in point of fact? Cannot they exercise authority over other people, if and so long as other people submit to it? This cannot be their meaning: this cannot be the meaning, not because it is an untrue and foolish one, but because it contributes nothing to the declared purpose. The meaning must be here, as elsewhere, that of every authority not issuing from the nation in an express manner, every act is void: consequently ought to be treated as such — resisted, risen up against, and overthrown. Issuing from the nation in an express manner, is having been conferred by the nation, by a formal act, in the exercise of which the nation, *i. e.* the whole nation, joined.

An authority issues from the nation in one sense, in the ordinary implied manner, which the nation submits to the exercise of, having been in the habit of submitting to it, every man as long as he can remember, or to some superior authority from which it is derived. But this meaning it was the evident design of the article to put a negative upon; for it would not have answered the disorganizing purpose, all along apparent, and more than once avowed. It is accordingly for the purpose of putting a negative upon it, that the word *expressément — in an express way or manner* — is subjoined. Every authority is usurped and void, to which a man has been appointed in any other mode than that of popular election; and popular election made by the nation — that is, the whole nation (for no distinction or division is intimated,) in each case.

And this is expressly declared to be the case, not only in France, under the government of France, but *everywhere*, and under every government whatsoever. Consequently, all the acts in every government in Europe, for example, are void, excepted, perhaps, or rather not excepted, two or three of the Swiss Cantons;—the persons exercising the powers of government in these countries, usurpers — resistance to them, and insurrection against them, lawful and commendable.

The French government itself not excepted: — whatever is, has been, or is to be, the government of France. Issue from *the* nation: that is, from the *whole* nation, for no part of it is excluded. Women consequently included, and children — children of every age. For if women and children are not part of the nation, what are they? Cattle? Indeed, how can a single soul be excluded, when all men—all human creatures—are, and are to be, equal in regard to rights—in regard to all sorts of rights, without exception or reserve?

ARTICLE IV.

Liberty consists in being able to do that which is not hurtful to another, and therefore the exercise of the natural rights of each man has no other bounds than those which insure to the other members of the society the enjoyment of the same rights. These bounds cannot be determined but by the law.

In this article, three propositions are included: —

Proposition 1. Liberty consists in being able to do that which is not hurtful to another. What! in that, and nothing else? Is not the liberty of doing mischief liberty? If not, what is it? and what word is there for it in the language, or in any language by which it can be spoken of? How childish, how repugnant to the ends of language, is this perversion of language! — to attempt to confine a word in common and perpetual use, to an import to which nobody ever confined it before, or will continue to confine it! And so I am never to know whether I am at liberty or not to do or to omit doing one act, till I see whether or no there is anybody that may be hurt by it — till I see the whole extent of all its consequences? Liberty! What liberty? — as against what power? as against coercion from what source? As against coercion issuing from the law? — then to know whether the law have left me at liberty in any respect in relation to any act, I am to consult not the words of the law, but my own conception of what would be the consequences of the act. If among these consequences there be a single one by which anybody would be hurt, then, whatever the law says to me about it, I am not at liberty to do it. I am an officer of justice, appointed to superintend the execution of punishments ordered by justice: — if I am ordered to cause a thief to be whipped, — to know whether I am at liberty to cause the sentence to be executed, I must know whether whipping would hurt the thief: if it would, then I am not at liberty to whip the thief — to inflict the punishment which it is my duty to inflict.

Proposition 2. And therefore the exercise of the natural rights of each man has no other bounds than those which insure to the other members of the society the enjoyment of those same rights. Has no other bounds? Where is it that it has no other bounds? In what nation — under what government? If under any government, then the state of legislation under that government is in a state of absolute perfection. If there be no such government, then, by a confession necessarily implied, there is no nation upon earth in which this definition is conformable to the truth.

Proposition 3. These bounds cannot be determined but by the law. More contradiction, more confusion. What then? — this liberty, this right, which is one of four rights that existed before laws, and will exist in spite of all that laws can do, owes all the boundaries it has, all the extent it has, to the laws. Till you know what the laws say to it, you do not know what there is of it, nor what account to give of it: and yet it existed, and that in full force and vigour, before there were any such things as laws; and so will continue to exist, and that for ever, in spite of anything which laws can do to it. Still the same inaptitude of expressions — still the same confusion of that which it is supposed *is*, with that which it is conceived ought to be.

What says plain truth upon this subject? What is the sense most approaching to this nonsense?

The liberty which the law *ought* to allow of, and leave in existence — leave uncoerced, unremoved — is the liberty which concerns those acts only, by which, if exercised, no

damage would be done to the community upon the whole; that is, either no damage at all, or none but what promises to be compensated by at least equal benefit.

Accordingly, the exercise of the rights allowed to and conferred upon each individual, ought to have no other bounds set to it by the law, than those which are necessary to enable it to maintain every other individual in the possession and exercise of such rights as it is consistent with the greatest good of the community that he should be allowed. The marking out of these bounds ought not to be left to anybody but the legislator acting as such—that is, to him or them who are acknowledged to be in possession of the sovereign power: that is, it ought not to be left to the occasional and arbitrary declaration of any individual, whatever share he may possess of subordinate authority.

The word *autrui* — another, is so loose,— making no distinction between the community and individuals, — as, according to the most natural construction, to deprive succeeding legislators of all power of repressing, by punishment or otherwise, any acts by which no individual sufferers are to be found; and to deprive them beyond a doubt of all power of affording protection to any man, woman, or child, against his or her own weakness, ignorance, or imprudence.

ARTICLE V.

The law has no right to forbid any other actions than such as are hurtful to society. Whatever is not forbidden by the law, cannot be hindered; nor can any individual be compelled to do that which the law does not command.

Sentence 1. The law has no right (*n'a le droit*) to forbid any other actions than such as are hurtful to society. The law has no right (*n'a le droit*, not *ne peut pas.*) This, for once, is free from ambiguity. Here the mask of ambiguity is thrown off. The avowed object of this clause is to preach constant insurrection, to raise up every man in arms against every law which he happens not to approve of. For, take any such action you will, if the law have no right to forbid it, a law forbidding it is null and void, and the attempt to execute it an oppression, and resistance to such attempt, and insurrection in support of such resistance, legal, justifiable, and commendable.

To have said that no law ought to forbid any act that is not of a nature prejudical to society, would have answered every good purpose, but would not have answered the purpose which is intended to be answered here.

A government which should fulfil the expectations here held out, would be a government of absolute perfection. The instance of a government fulfilling these expectations, never has taken place, nor till men are angels ever can take place. Against every government which fails in any degree of fulfilling these expectations, then, it is the professed object of this manifesto to excite insurrection: here, as elsewhere, it is therefore its direct object to excite insurrection at all times against every government whatsoever.

Sentence 2. Whatever is not forbidden by the law, cannot be hindered, nor can any individual be compelled to do what the law does not command.

The effect of this law, for want of the requisite exceptions or explanations, is to annihilate, for the time being and for ever, all powers of command: all power, the exercise of which consists in the issuing and inforcing obedience to particular and occasional commands; domestic power, power of the police, judicial power, military power, power of superior officers, in the line of civil administration, over their subordinates If I say to my son, Do not mount that horse, which you are not strong enough to manage; if I say to my daughter, Do not go to that pond, where there are young men bathing; they may set me at defiance, bidding me show them where there are anything about mounting unruly horses, or going where there are young men bathing, in the laws. By the same clause, they may each of them justify themselves in turning their backs upon the lesson I have given them; while my apprentice refuses to do the work I have given him; and my wife, instead of providing the meals I had desired her to provide for ourselves and family, tells me she thinks fit to go and dine elsewhere. In the existing order of things, under any other government than that which was here to be organized, whatever is commanded or forbidden in virtue of a power which the law allows of and recognises, is virtually and in effect commanded and forbidden by the law itself, since, by the support it gives to the persons in question in the exercise of their respective authorities, it shows itself to have adopted those commands, and considered them as its own before they are issued, and that, whatever may be the purport of them, so long as they are confined within the limits it has marked out. But all these existing governments being fundamentally repugnant to the rights of man, are null and void, and incapable of filling up this or any other gap in the texture of the new code. Besides, this right of not being hindered from doing anything which the law itself has not forbidden, nor compelled to do anything which it has not commanded, is an article of natural, unalienable, sacred, and imprescriptible right, over which political laws have no sort of power; so that the attempt to fill up the gap, and to establish any such power of commanding or forbidding what is not already commanded and forbidden by the

law, would be an act of usurpation, and all such powers so attempted to be established, null and void. How also can any such powers subsist in a society of which all the members are free and equal in point of rights?

Admit, however, that room is given for the creation of the powers in question by the spirit, though not by the letter of this clause — what follows? That in proportion as it is harmless, it is insignificant, and incapable of answering its intended purpose. This purpose is to protect individuals against oppressions, to which they might be subjected by other individuals possessed of powers created by the law, in the exercise or pretended exercise of those powers. But if these powers are left to the determination of succeeding and (according to the doctrine of this code) inferior legislatures, and may be of any nature and to any extent which these legislatures may think fit to give them, — what does the protection here given amount to, especially as against such future legislatures, for whose hands all the restraints which it is the object of the declaration to provide are intended? Mischievous or nugatory is still the alternative.

The employment of the improper word *can*, instead of the proper word *shall*, is not unworthy of observation. Shall is the language of the legislator who knows what he is about, and aims at nothing more: — can, when properly employed in a book of law, is the language of the private commentator or expositor, drawing inferences from the text of the law — from the acts of the legislator, or what takes the place of the acts of the legislator — the practice of the courts of justice.

ARTICLE VI.

The law is the expression of the general will. Every citizen has the right of concurring in person, or by his representatives, in the formation of it: it ought to be the same for all, whether it protect, or whether it punish. All the citizens being equal in its eyes, are equally admissible to all dignities, public places, and employments, according to their capacity, and without any other distinction than that of their virtues and their talents.

This article is a *hodge-podge*, containing a variety of provisions, as wide from one another as any can be within the whole circuit of the law: some relating to the constitutional branch, some to the civil, some to the penal; and, in the constitutional department, some relating to the organization of the supreme power, others to that of the subordinate branches.

Proposition 1. The law is the expression of the general will. The law? What law is the expression of the general will? Where is it so? In what country?—at what period of time? In no country — at no period of time — in no other country than France — nor even in France. As to *general*, it means universal; for there are no exceptions made, — women, children, madmen, criminals — for these being human creatures, have already been declared equal in respect of rights: nature made them so; and even were it to be wished that the case were otherwise, nature's work being unalterable, and the rights unalienable, it would be to no purpose to attempt it.

What is certain is, that in any other nation at any rate, no such thing as a law ever existed to which this definition could be applied. But that is nothing to the purpose, since a favourite object of this effusion of universal benevolence, is to declare the governments of all other countries dissolved, and to persuade the people that the dissolution has taken place.

But anywhere—even in France—how can the law be the expression of the universal or even the general will of all the people, when by far the greater part have never entertained any will, or thought at all about the matter; and of those who have, a great part (as is the case with almost all laws made by a large assembly) would rather it had not taken place.

Sentence 2. Every citizen has the right of concurring in person, or by his representatives, in the formation of it.

Here the language changes from the enunciation of the supposed practice, to the enunciation of the supposed matter of right. Why does it change? After having said so silly a thing as that there is no law anywhere, but what was the expression of the will of every member of the community, what should have hindered its going on in the same silly strain, and saying that everybody did concur — did join in the formation of it? However, as the idea of right is, in this second sentence at any rate, presented by its appropriate term, the ambiguity diffused by the preceding sentence is dissipated; and now it appears beyond a doubt, that every law in the formation of which any one citizen was debarred from concurring, either in person or by his representatives, is, and ever will be, here and there and everywhere, a void law.

To characterize proxies, the French language, like the English, has two words — representatives and deputies: the one liable to misconstruction, the other not, — to misconstruction, and such misconstruction as to be made expressive of a sense directly opposite to that which appears here to have been intended; the one tainted with fiction as well as ambiguity, the other expressing nothing but the plain truth. Being so superior to imitation — so free to choose — not tied down by usage as people in Britain are — how come they to have taken the English word representatives, which has given occasion to

so many quibbles, instead of their own good word deputies, which cannot give occasion to anything like a quibble? The king of Great Britain is acknowledged to be the representative of the British nation, in treating with foreign powers; but does the whole nation ever meet together and join in signing an authority to him so to do? The king of Great Britain is acknowledged, in this instance, to represent the British nation; but, in this instance, is it ever pretended that he has been deputed by it? The parliamentary electors have been said to represent the non-electors; and the members of parliament to represent both; but did anybody ever speak of either members or electors as having been deputed by the non-electors? Using the improper word representatives, instead of the proper word deputies, the French might be saddled with the British constitution, for anything there is in this clause to protect them from so horrible a grievance. Representatives sounded better, perhaps, than deputies. Men who are governed by sounds, sacrifice everything to sound: they neither know the value of precision, nor are able to attain it.

Sentence 3. It [the law] ought to be the same for all, whether it protect or whether it punish — [*i. e.* as well in respect of the protection it affords, as in respect of the punishment it inflicts.]

This clause appears reasonable in the main, but in respect to certain points it may be susceptible of explanations and exceptions, from the discussion of which it might have been as well if all posterity had not been debarred.

As to protection, English law affords a punishment, which consists in being put out of the protection of the law; in virtue of which a man is debarred from applying for redress from any kind of injury. For my own part, I do not approve of any such punishment: but perhaps they do, who having it in their power to abrogate it, yet retain it. In France, I suppose it is approved of, where, in a much severer form than the English, it has been so much practised. This species of punishment is inhibited for ever, by the letter at least of this clause. As to the spirit of it, one of the ruling features of this composition from end to end is, that the spirit of it is incomprehensible.

Under the English law, heavier damages are given in many instances to the ministers of justice, acting as such, in case of ill-founded prosecutions against them, for supposed injuries to individuals, than would be given to private individuals aggrieved by prosecutions for the same injuries. The notion evidently is, that the servants of the public, not having so strong an interest in defending the rights of the public as individuals have in defending their own, the public man would be apt to be deterred from doing his duty if the encouragement he have to do it were no greater than the encouragement which the individual has to defend his right. These examples, not to plunge further into details, appear sufficient to suggest a reasonable doubt, whether, even in this instance, the smack-smooth equality, which rolls so glibly out of the lips of the rhetorician, be altogether compatible with that undeviating conformity to every bend and turn in the line of utility which ought to be the object of the legislator.

As to punishment, a rule as strictly subordinate to the dictates of utility, as the doctrine of undeviating equality is congenial to the capricious play of the imagination, is, not in any instance to employ more punishment than is necesary to the purpose. Where, as between two individuals, the measure of sensibility is different, a punishment which in name—that is, according to every description which could be given of it in and by the law, would be equal in the two instances—would in effect be widely different. Fifty lashes may, in the estimation of the law, be equal to fifty lashes; but it is what no man can suppose, that the suffering which a hard-working young man, or even a young woman of the hard-working class, would undergo from the application of fifty lashes, could be really equal in intensity to that which must have been endured from the same nominal punishment (were even the instrument and force applied the same) by the Countess Lapuchin, till then the favourite, and one of the finest ornaments of the court of a Russian empress. Banishment would, upon the face of the law, be equal to banishment: but it will not readily be admitted, that to a servant of the public, who happens to have nothing to live upon but a salary, the receipt of which depends upon attendance at his office, it would be no greater punishment than to a sturdy labourer, who in one country as well as in another, may derive an equal livelihood from the labour of his hands.

Those, if any such there are, to whom distinctions such as these would appear consonant to reason and utility, might perhaps regard them as not irreconcilable with the language of this clause. But others might think them either not reasonable, or, though reasonable, not thus reconcilable. And were any such distinctions to be ingrafted into the law by any succeeding legislators, those who did not approve of the alteration would, if at all actuated by any regard to the tenor and spirit of this declaration, raise a cry of aristocracy, and pronounce the alteration void: and then comes resistance and insurrection, and all the evils in their train.

Sentence 4. All the citizens being equal in its eyes, are all of them admissible to all dignities, public places, and employments,

according to their capacity, and without any other distinction than that of their virtues and their talents.

This is one of the few clauses, not to say the only one, which does not seem liable to very serious objection: there is nothing to object to in its general spirit and meaning, though perhaps there is something as to the expression. In general, it were to be wished that no class of men should stand incapacitated with regard to any object of competition by any general law: nor can anything be said in favour of those hereditary incapacitations which suggested and provoked this clause. Yet as governments are constituted, and as the current of opinion runs, there may be cases where some sorts of incapacitation in regard to office seem called for by the purpose which operated as the final cause in the institution of the office. It seems hardly decent or consistent, for example, to allow to a Jew the faculty of presenting to a Christian benefice with cure of souls: though, by a judgment of no very ancient date, the law of England was made to lend its sanction to an appointment of this sort. As inconsistent does it appear to admit a Catholic patron to appoint to a Protestant, or a Protestant to a Catholic benefice; at least so long as diversities in matters of religious profession continue to have ill-will for their accompaniment. Ecclesiastical patronage in the hands of individuals, is indeed one of the abuses, or supposed abuses, which it was the object of this code to eradicate: and since then, the maintenance of an ecclesiastical establishment of any kind at the expense of the state, has, in France, been added to the catalogue of abuses. But at the time of the promulgation of this code, the spirit of subversion had not proceeded this length: ecclesiastical offices were still kept up; though, in relation to all these, together with all other offices, the right of nomination was given to assemblies of the people. The incongruity of admitting the professor of a rival religion to the right of suffrage, would therefore be the same in this instance as in the case where the nomination rested in a single breast, though the danger would seldom be of equal magnitude.

Madmen, and criminals of the worst description, are equally protected against exclusion from any office, or the exercise of any political right. As to offices which under this system a man cannot come into possession of but by election, the inconvenience, it may be said, cannot be great; for though not incapable of being elected, there is no danger of their being so. But this is not the case with regard to any of those political privileges which this system gives a man in his own right, and as a present derived from the hands of nature—such as the right of suffrage with regard to offices. Were an assassin, covered with the blood of the murdered person, and ordered for execution on the second of the month — or, which is doubtless esteemed worse, a royalist convicted of adherence to the government under which his country had existed for so many hundred years — to put in his claim for admittance to give his suffrage in the election of a deputy to the convention, or of a mayor of the Paris municipality, I see not how his claim could be rejected without an infringement of this clause. Indeed, if this right, like all the others, be, as we are told over and over again, a present of the goddess Nature, and proof against all attacks of law, what is to be done, and what remedy can be administered by the law? Something, it is true, is said of talents and of virtues; and the madman, it may be said, is deficient in talents, and the criminal in point of virtues. But neither talents nor virtues are mentioned otherwise than as marks of pre-eminence and distinction, recommending the possessors to a proportionable degree of favour and approbation with a view to preference: nothing is said of any deficiency in point of talent or virtue as capable of shutting the door against a candidate: distinction is the word, not exception, — distinction among persons all within the list, not exception excluding persons out of the list.

So far from admitting the exclusion of classes of men, however incompetent, the provision does not so much as admit of the exclusion of individuals from any office. An individual, or a knot of individuals, bent upon affording a constant obstruction to all business, and selected perhaps for that very purpose, might be returned to the supreme assembly, or any other; nor could they be got rid of without a breach of the natural and inviolable rights of man, as declared and established by this clause.

What makes the matter still the clearer is, that the particular provision is given in the character of a consequence of, that is, as being already included in the preceding article, declaring the perfect and unchangeable equality of mankind in respect of all manner of rights:— "The citizens being all of them equal in its sight, are all of them equally admissible," and so forth. As the general proposition, therefore, admits of no exception to it, no more can this particular application of it have one. Virtues and talents sound prettily, and flatter the imagination, but in point of clearness, had that been the object, the clause, such as it is, would have been all the better had it ended with the words public places and employments; and had all that is said about capacity, and distinction, and virtues, and talents, been left out.

ARTICLE VII.

No one can be accused, arrested or de-

tained, but in the cases determined by the law, and according to the forms prescribed by the law. Those who solicit, issue, execute, or cause to be executed, arbitrary orders, ought to be punished; but every citizen, summoned or arrested in virtue of the law, ought to obey that instant: he renders himself culpable by resistance.

Sentence 1. No one can be accused, arrested, or detained, but in the cases determined by the law, and according to the forms prescribed by the law.

Here again we have the improper word *can*, instead of *ought*. Here, however, the power of the law is recognized, and passes unquestioned: the clause, therefore, is in so far not mischievous and absurd, but only nugatory, and beside the purpose. The professed object of the whole composition is to tie the hands of the law, by declaring pretended rights over which the law is never to have any power,—liberty, the right of enjoying liberty: — here this very liberty is left at the mercy and good pleasure of the law. As it neither answers the purpose it professes to have in view, so neither does it fulfil the purpose which it ought to have had in view, and might have fulfilled,—the giving the subject, or, to speak in the French style, the citizen, that degree of security which, without attempting to bind the hands of succeeding legislators, might have been given him against arbitrary mandates.

There is nothing in this article which might not be received, and without making any alteration, into the constitutional codes of Prussia, Denmark, Russia, or Morocco. It is or is not law — (no matter which, for I put it so only for supposition sake) — it is law, let us say, in those countries, that upon order signed or issued by any one of a certain number of persons—suppose ministers of state—any individual may be arrested at any time, and detained in any manner and for any length of time, without any obligation on the part of the person issuing the order to render account of the issuing or of the execution of it to anybody but the monarch. If such were the law in these countries respectively, before the establishment of such a law as this clause imports, such may it remain, and that without effecting any abridgment of the powers of the ministers in question, or applying any check to the abuses of those powers, or affording the subject any security or remedy against the abuses of those powers, after the introduction of such article.

The case in which it is determined by the law, that a man may be so arrested and detained, is the case of an order having been issued for that purpose by any one in such a list of ministers; and the form in which the order for that purpose must be conceived, is the wording in the form in which orders to the purpose in question have been in use to be worded, or, in short, any other form which the ministers in question may be pleased to give it. If to this interpretation any objection can be made, it must be grounded on the ambiguity of the word *the law*—an ambiguity resulting from the definition above given of it in this declaratory code. If the laws are all of them *ipso facto* void, as this manifesto has, by the preceding article, declared them to be in all countries where the laws are made by other authority than that of the whole body of the people, then indeed the security intended to be afforded is afforded; because in that case no arrest or detention can be legal, till the ground and form of it have been preordained by a law so established. On the contrary, if that article be to be explained away, and countries foreign to France are to be left in possession of their laws, then the remedy and security amounts to nothing, for the reason we have seen. Nugatory or mischievous: such is the option everywhere else — such is the option here.

Sentence 2. Those who solicit, issue, execute or cause to be executed, arbitrary orders, ought to be punished.

Yes, says a Moullah of Morocco, after the introduction of this article into the Morocco code, — yes, if an order to the prejudice of the liberty of the subject be illegal, it is an arbitrary order, and the issuing of it is an offence against the liberty of the subject, and as such ought to be, and shall be punished. If one dog of an infidel presume to arrest or detain another dog of an infidel, the act of arrest and detention is an arbitrary one, and nothing can be more reasonable than what the law requires, viz. that the presuming dog be well bastinadoed. But if one of the faithful, to every one of whom the sublime emperor, crowned with the sun and moon, has given the command over all dogs, think fit to shut up this or that dog in a strange kennel, what is there of arbitrariness in that? It is no more than what our customs, which are our laws, allow of everywhere, when the true believers have dogs under them.

The security of the individual in this behalf depends, we see, upon the turn given to that part of the law which occupies itself in establishing the powers necessary to be established for the furtherance of justice. Had the penners of this declaration been contented with doing what they might have done consistently with reason and utility, in this view they might have done thus:—they might have warned and instructed them to be particular in the indication of the cases in which they would propose to grant such powers, and in the indication of the forms according to which the powers so granted should be exercised;—for instance, that no man should be arrested but for some one in the list of cases enumerated by the law as capable of warranting

an arrest; nor without the specification of that case in an instrument, executed for the purpose of warranting such arrest; nor unless such instrument were signed by an officer of such a description; and so on: — not to attempt to exhibit a code of such importance, extent, and nicety, in the compass of a parenthesis. In doing so, they would have done what would at least have been innocent, and might have had its use: — but in doing so, they would not have prosecuted their declared purpose; which was not only to tutor and lecture their more experienced and consequently more enlightened successors, but to tie their hands, and keep their fellow-citizens in a state of constant readiness to cut their throats.

Sentence 3. But every citizen summoned or arrested in virtue of the law, ought to obey that instant: he renders himself culpable by resistance.

This clause is mighty well in itself: — the misfortune is, that it is nothing to the purpose. The title of this code is the Declaration of Rights; and the business of it is accordingly, in every other part of it, to declare such rights, real or supposed, as are thought fit to be declared. But what is here declared is for once a *duty;* the mention of which has somehow or other slipt in, as it were through inadvertence. The things that people stand most in need of being reminded of, are, one would think, their duties: — for their rights, whatever they may be, they are apt enough to attend to of themselves. Yet it is only by accident, under a wrong title, and as it were by mistake, and in this single instance, that anything is said that would lead the body of the people to suspect that there were any such things appertaining to them as *duties.*

He renders himself culpable by resistance: Oh yes — certainly, unless the law for the infringement of which he is arrested, or attempted to be arrested, be an oppresive one: or unless there be anything oppressive in the behaviour of those by whom the arrest or detention is performed. If, for instance, there be anything of the insolence of office in their language or their looks, — if they lay hold of him on a sudden, without leaving him time to run away, — if they offer to pinion his arms while he is drawing his sword, without waiting till he have drawn it, — if they lock the door upon him, or put him into a room that has bars before the window, — or if they come upon him the same night, while the evidences of his guilt are about him and all fresh, instead of waiting on the outside of the door all night till he have destroyed them.* In any of these cases, as well as a thousand others that might be mentioned, can there be any doubts about the oppression? but by Article II. of this same code — an article which has already been established and placed out of the reach of cavil, the right of resistance to oppression is among the number of those rights which nature hath given, and which it is not in the power of man to take away.

ARTICLE VIII.

The law ought not to establish any other punishments than such as are strictly and evidently necessary; and no one can be punished but in virtue of a law established and promulgated before the commission of the offence, and applied in a legal manner.

Sentence 1. The law ought not to establish any other punishments than such as are strictly and evidently necessary.

The instruction administered by this clause is not great: so far, however, is well, that the purpose declared in this instrument is departed from, and nothing but instruction is here attempted to be given; and which succeeding legislators may be governed by or not as they think fit. It is well, indeed, that penal laws not conforming to this condition are not included in the sentence of nullity so liberally dealt out on other occasions, since, if they were, it would be difficult enough to find a penal law anywhere that would stand the test, from whatever source — pure or impure, democratical, aristocratical, or monarchical — it were derived.

No rules of any tolerable degree of particularity and precision have ever yet been laid down for adjusting either the quantum or the quality of punishments — none such at least could have been in the contemplation of the framers of this code: and supposing such rules laid down, and framed with the utmost degree of particularity and precision of which the nature of the subject is susceptible, it would

* By a subsequent decree of the Convention, this silly provision was actually made law, under the notion of favouring liberty. The liberty of doing mischief, it certainly does favour, as certainly as it disfavours the liberty of preventing it. Ask for a reason: *a man's house*, you are told, *is his castle.* Blessed liberty! — where the trash of sentiments — where epigrams, pass for reasons, and poetry gives rule to law! But if a man's house be his castle by night, how comes it not to be so by day? And if a house be a castle to the owner, why not to everybody else in whose favour the owner chooses to make it so? By day or by night, is it less hardship to a suspected person to have his house searched, than to an unsuspected one? Here we have the mischief and the absurdity of the ancient ecclesiastical asylums, without the reason.

The course of justice in England is still obstructed to a certain degree by this silly epigram, worthy of the age which gave it birth. Delinquents, like foxes, are to have law given them: that is, are to have chances of escape given them on purpose, as if it were to make the better sport for the hunters — for the lawyers, by and for whom the hunt is made.

still be seen in most instances, if not in every instance, that the offence admitted optionally of a considerable variety of punishments, of which no one could be made to appear to be strictly and evidently necessary, to the exclusion of the rest.

As a mere *memento*, then, of what is fit to be attended to, a clause to this effect may be very well; but as an instruction, calculated to point out in what manner what is so fit to be attended to may be accomplished, nothing can be more trifling or uninstructive: — it is even erroneous and fallacious, since it assumes, and that by necessary implication, that it is possible, in the case of every offence, to find a punishment of which the strict necessity is capable of being made evident,—which is not true. Unfortunately, the existence of a system of punishments of which the absolute necessity is capable of being made evident, with reference to the offences to which they are respectively annexed, is not altogether so clear as the existence of the article by which succeeding legislators are sent in quest of such a system by these their masters and preceptors. One thing is but too evident, that the attention bestowed by the penner of this article, on the subject on which he gives the law to posterity so much at his ease, was anything but strict. It was the Utopia created by the small talk of Paris that was dancing before his eyes, and not the elementary parts of the subject-matter he was treating of — the list of possible punishments, confronted with the list of possible offences. He who writes these observations has bestowed a closer and more minute inquiry into the subject than anybody who has been before him — he has laid down a set of rules, by which, as he conceives, the disproportion but too generally prevalent between punishments and offences, may be reduced within bounds greatly more narrow than it occupies anywhere at present in any existing code of laws — and what he would undertake for is, not to make evident any such list of strictly necessary punishments, but the impossibility of its existence.

Sentence 2. No one can be punished but in virtue of a law established and promulgated before the commission of the offence, and applied in a legal manner.

This clause—if instead of the insurrection-inviting word *can*, the word *ought* had been employed, as in the preceding clause of this same article — would, as far as it goes, have been well enough. As it is, while on the one hand it not only tends to bring in the everlasting danger of insurrection, — on the other hand, it leaves a considerable part of the danger against which it is levelled, uncovered and unprovided against.

Numerous are the occasions on which sufferings as great as any that, being inflicted with a view to punishment, go under the denomination of punishment, may be inflicted without any such view. These cases a legislator who understood his business would have collected and given notice of, for the purpose of marking out the boundaries and confines of the instruction in question, and saving it from misapplication. Laying an embargo, for instance, is a species of confinement, and, were a man subjected to it with a view to punishment, might in many cases be a very severe punishment: yet if the providence of the legislator happen not to have provided a general law empowering the executive authority to lay an embargo in certain cases, the passing of a special law for that purpose, after the incident which calls for it has taken place, may be a very justifiable, and even necessary measure; for instance, to prevent intelligence from being communicated to a power watching the moment to commence hostilities, or to prevent articles of subsistence or instruments of defence, of which there is a deficiency in the country, from being carried out of it.

Banishment must, in a certain sense, be admitted to be equally penal, whether inflicted for the purpose of punishment, or only by way of precaution, — for the purpose of prevention, and without any view to punishment. Will it be said, that there is no case in which the supreme government of a country ought to be trusted with the power of removing out of it, not even for a time, any persons, not even foreigners, from whom it may see reason to apprehend enterprises injurious to its peace? So in the case of imprisonment, which, though in some instances it may be a severer, may in others be a less severe infliction than banishment. Even death, a suffering which, if inflicted with a view to punishment, is the very extremity of punishment, and which, according to my own conception of the matter, neither need nor ought to be inflicted in any instance for the purpose of punishment, may, in some certain instances perhaps, be highly necessary to be inflicted without any view to punishment — for example, to prevent the diffusion of the plague.

Thus it is, that while the clause passing censure on *ex post facto* penal laws (a censure in itself, and, while it confines itself to the cases strictly within its declared subject, so highly reasonable) is thus exhibited with the insurrection-inciting *can* in it, and without the explanations necessary, as we have seen, to guard it against misapplication, the country is exposed to two opposite dangers: one, that an infliction necessary for the purpose of prevention should be resisted and risen up against by individuals, under the notion of its being included in the prohibition given by this clause; the other, that the measure, how necessary soever, should be abstained

from by the legislature through apprehension of such resistance.

As to the concluding epithet, *and legally applied*, it might have been spared without any great injury to the sense. If the law referred to in justification of an act of power have not been legally applied in the exercise of that act of power, the act has not been exercised in virtue of that law.

ARTICLE IX.

Every individual being presumed innocent until he have been declared guilty, — if it be judged necessary to arrest him, every act of rigour which is not necessary to the making sure of his person, ought to be severely inhibited by the law.

This article being free from the insurrection-exciting particle, and confining itself to the office of simple instruction, is so far innocent: the object of it is laudable, though the purport of it might have been expressed with more precision.

The maxim it opens with, though of the most consummate triviality, is not the more conformable to reason and utility, and is particularly repugnant to the regulation in support and justification of which it is adduced. That every man *ought* to be presumed innocent (for "is presumed innocent" is nonsense,) until he have been *declared* (that is, adjudged) guilty, is very well so long as no accusation has been preferred against him, — or rather, so long as neither that nor any other circumstance appears to afford reason for suspecting the contrary — but very irrational, after that ground for supposing he may have been guilty has been brought to light.

The maxim is particularly misapplied and absurd when applied to the case where it has been judged proper (on sufficient grounds we are to suppose) to put him under arrest, to deprive him of his power of locomotion. Suppose him innocent, and the defalcation made from his liberty is injurious and unwarrantable. The plain truth of the matter is, that the only rational ground for empowering a man to be arrested in such a case, is its not being yet known whether he be innocent or guilty: suppose him guilty, he ought to be punished — suppose him innocent, he ought not to be touched. But plain unsophisticated truth and common sense do not answer the purpose of poetry or rhetoric; and it is from poetry and rhetoric that these tutors of mankind and governors of futurity take their law. A clap from the galleries is their object, not the welfare of the state.

As for the expression, *ought to be severely repressed* (by punishment I suppose,) it is as well calculated to inflame (the general purpose of this effusion of matchless wisdom) as it is ill calculated to instruct. A rather more simple and instructive way of stating it would have been to say, in relation to every such exercise of rigour which goes beyond what appears necessary to the purpose in question — that of making sure of the person, that not coming within the ground of justification taken from that source, it remains upon the footing of an offence of that description of delinquency, whatever it be, of an injury of the species in question, whatever it may be. The satisfaction and punishment annexed to it will come of course to be of the same nature and extent as for an injury of the same nature and extent having no such circumstance to give occasion to it. Should the punishment in such case be greater or less than the punishment for the same injury would be if altogether divested of the justification which covers the remainder of the unpleasant treatment? Should the punishment of the minister of justice exceeding his authority, be greater or less than that of the uncommissioned individual doing the same mischief without any authority? On some accounts (as would be found upon proper inquiry,) it should be greater: on other accounts, not so great. But these are points of minute detail, which might surely as well have been left to the determination of those who would have had time to give them due examination, as determined upon at random by those who had no such time. The words of this article seem to intimate, that the punishment for the abuse of power by the minister of justice ought to be the greater of the two. But why so? You know better where to meet with the minister of justice than with an offending individual taken at large: — the officer has more to lose than the individual: — and the greater the assurance you have that a delinquent, in case of accusation, will be forthcoming, in readiness to afford satisfaction in the event of his being sentenced to afford it, the less the alarm which his delinquency inspires.

ARTICLE X.

No one ought to be molested [meaning, probably, by government] *for his opinions, even in matters of religion, provided that the manisfestation of them does not disturb* [better expressed perhaps by saying, except in as far as the manifestation of them disturb, or rather tends to the disturbance of] *the public order established by the law.*

Liberty of publication with regard to opinions, under certain exceptions, is a liberty which it would be highly proper and fit to establish, but which would receive but a very precarious establishment from an article thus worded. Disturb the public order? — what does that mean? Louis XIV. need not have hesitated about receiving an article thus worded into his code. The public order of things in this behalf, was an order in

virtue of which the exercise of every religion but the Catholic, according to his edition of it, was proscribed. A law is enacted, forbidding men to express a particular opinion, or set of opinions, relative to a particular point in religion: forbidding men to express any of those opinions, in the expression of which the Lutheran doctrine, for example, or the Calvinistic doctrine, or the Church of England doctrine consists: — in a prohibition to this effect, consists the public order established by the law. Spite of this, a man manifests an opinion of the number of those which thus stand prohibited as belonging to the religion thus proscribed. The act by which this opinion is manifested, is it not an act of disturbance with relation to the public order thus established? Extraordinary indeed must be the assurance of him who could take upon him to answer in the negative.

Thus nugatory, thus flimsy, is this buckler of rights and liberties, in one of the few instances in which any attempt is made to apply it to a good purpose.

What should it have done, then? To this question an answer is scarcely within the province of this paper: the proposition with which I set out is, not that the Declaration of Rights should have been worded differently, but that nothing under any such name, or with any such design, should have been attempted.

A word or two, however, may be given as a work of supererogation: — that opinions of all sorts might be manifested without fear of punishment; that no publication should be deemed to subject a man to punishment on account of any opinions it may be found to contain, considered as mere opinions; but at the same time, that the plea of manifesting religious opinions, or the practising certain acts supposed to be enjoined or recommended in virtue of certain religious opinions as proper or necessary to be practised, should not operate as a justification for either exercising, or prompting men to exercise, any act which the legislature, without any view or reference to religion, has already thought fit, or may hereafter think fit, to insert into the catalogue of prohibited acts or offences.

To instance two species of delinquency, — one of the most serious, the other of the slightest nature — acts tending to the violent subversion of the government by force — acts tending to the obstruction of the passage in the streets: — An opinion that has been supposed by some to belong to the Christian religion, is, that every form of government but the monarchical is unlawful: an opinion that has been supposed by some to belong to the Christian religion — by some at least of those that adhere to that branch of the Christian religion which is termed the Roman Catholic — is, that it is a duty, or at least a merit, to join in processions of a certain description, to be performed on certain occasions.

What, then, is the true sense of the clause in question, in relation to these two cases? What ought to be the conduct of a government that is neither monarchical nor Catholic, with reference to the respective manifestation of these two opinions?

First, as to the opinion relative to the unlawfulness of a government not monarchical. The falsity or erroneousness which the members of such a government could not but attribute in their own minds to such an opinion, is a consideration which, according to the spirit and intent of the provision in question, would not be sufficient to authorize their using penal or other coercive measures for the purpose of preventing the manifestation of them. At the same time, should such manifestation either have already had the effect of engaging individuals in any attempt to effect a violent subversion of the government by force, or appear to have produced a near probability of any such attempt — in such case, the engagement to permit the free manifestation of opinions in general, and of religious opinions in particular, is not to be understood to preclude the government from restraining the manifestation of the opinion in question, in every such way as it may deem likely to promote or facilitate any such attempt.

Again, as to the opinion relative to the meritoriousness of certain processions. By the principal part of the provision, government stands precluded from prohibiting publications manifesting an opinion in favour of the obligatoriness or meritoriousness of such processions. By the spirit of the same engagement, they stand precluded from prohibiting the performance of such processions, unless a persuasion of a political inconvenience as resulting from such practice — a persuasion not grounded on any notions of their unlawfulness in a religious view — should come to be entertained: as if, for example, the multitude of the persons joining in the procession, or the crowd of persons flocking to observe them, should fill up the streets to such a degree, or for such a length of time, and at intervals recurring with such frequency, as to be productive of such a degree of obstruction to the free use of the streets for the purposes of business, as in the eye of government should constitute a body of inconvenience worth encountering by a prohibitive law.

It would be a violation of the spirit of this part of the engagement, if the government, — not by reason of any view it entertained of the political inconveniences of these processions (for example, as above,) but for the purpose of giving an ascendency to religious opinions of an opposite nature (determined, for example, by a Protestant antipathy to Catholic processions) — were to make use of

the real or pretended obstruction to the free use of the streets, as a pretence for prohibiting such processions.

These examples, while they serve to illustrate the ground and degree and limits of the liberty which it may seem proper, on the score of public tranquillity and peace, to leave to the manifestation of opinions of a religious nature, may serve, at the same time, to render apparent the absurdity and perilousness of every attempt on the part of the government for the time being, to tie up the hands of succeeding governments in relation to this or any other spot in the field of legislation. Observe how nice, and incapable of being described beforehand by any particular marks, are the lines which mark the limits of right and wrong in this behalf — which separate the useful from the pernicious — the prudent course from the imprudent! — how dependent upon the temper of the times — upon the events and circumstances of the day! — with how fatal a certainty persecution and tyranny on the one hand, or revolt and civil war on the other, may follow from the slightest deviation from propriety in the drawing of such lines! — and what a curse to any country a legislator may be, who, with the purest intentions, should set about settling the business to all eternity by inflexible and adamantine rules, drawn from the sacred and inviolable and imprescriptible rights of man, and the primeval and everlasting laws of nature!

I give the preference, for the purpose of exemplification, to one of those points of all others, in relation to which it would give me pleasure to see liberty established for ever, as it could be established consistently with security and peace. My persuasion is, that there is not a single point with relation to which it can answer any good purpose to attempt to tie the hands of future legislators; and so, that as there is not a single point, not even of my own choosing, in relation to which I would endeavour to give any such perpetuity to a regulation even of my own framing, it is still less to say — strong as it may appear to say — that were it to depend upon me, I would sooner, were the power of sanctioning in my hands, give my sanction to a body of laws framed by any one else, how bad soever it might appear to me, free from any such perpetuating clause, than a body of laws of my own framing, how well soever I might be satisfied with it, if it must be incumbered with such a clause.

ARTICLE XI.

The free examination of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write, and print freely, provided always that he shall be answerable for the abuse of that liberty in the cases determined by the law.

The logic of this composition is altogether of a piece with its policy. When you meet with a *therefore* — when you meet with a consequence announced as drawn from the proposition immediately preceding it, assure yourself that, whether the propositions themselves, as propositions, are true or false — as ordinances, reasonable or unreasonable, expedient or inexpedient — that the consequent is either in contradiction with the antecedent, or has nothing at all to do with it.

The liberty of communicating opinions is one branch of liberty; and liberty is one of the four natural rights of man, over which human ordinances have no power. There are two ways in which liberty may be violated: by physical or bodily coercion, and by moral coercion or demonstration of punishment; — the one applied before the time for exercising the liberty — the other to be applied after it, in the shape of punishment, in the event of its not producing its intended effect in the shape of prohibition.

What is the boon in favour of the branch of liberty here in question, granted by this article? It saves it from succeeding legislators in one shape — it leaves it at their mercy in the other. Will it be said, that what it leaves exposed to punishment is only the abuse of liberty? Be it so. What then? Is there less of liberty in the abuse of liberty than in the use of it? Does a man exercise less liberty when he makes use of the property of another, than when he confines himself to his own? Then are liberty and confinement the same thing — synonymous and interchangeable terms.

What is the abuse of liberty? It is that exercise of liberty, be it what it may, which a man who bestows that name on it does not approve of. Every abuse of this branch of liberty is left exposed to punishment; and it is left to future legislators to determine what shall be regarded as an abuse of it. What is the security worth, which is thus given to the individual as against the encroachments of government? What does the barrier pretended to be set up against government amount to? It is a barrier which government is expressly called upon to set up where it pleases. Let me not be mistaken: — what I blame these constitution-makers for, is, not the having omitted to tie the hands of their successors tight enough, but the suffering themselves to entertain a conceit so mischievous and so foolish as that of tying them up at all; and in particular for supposing, that were they weak enough to suffer themselves to be so shackled, a phrase or two of so loose a texture could be capable of doing the business to any purpose.

The general notion in regard to offences — a notion so general as to have become proverbial, and even trivial — is, that *prevention*

is better than punishment. Here prevention is abjured, and punishment embraced in preference. Once more, let me not be mistaken. In the particular case of the liberty of communicating opinions, there most certainly are reasons, for giving up the object of prevention, and in the choice of the means of repression, confining the repressive operations of the legislator to the application of punishment, which do not apply to other offences. A word or two to this purpose, and to justify the seeming inconsistency, would have been rather more instructive than most of those other instructions of which the authors of this code have been so liberal.

Not only is the consequent of these two propositions, clogged with the proviso at the tail of it, repugnant to the antecedent, but in itself it is much more extensive — it extends a vast way beyond what is intended as a covering for it. The free communication, of thoughts, and of opinions, I presume are here put as synonymous terms: the free communication of opinions, says the antecedent, is one of the most valuable of the rights of man — of those unalienable rights of man. What says the consequent of it? Not only that a man may communicate opinions without the possibility of being prevented, but that he is to be at liberty to communicate what he will, without the possibility of being prevented, and in any manner, — false allegations in matters of fact, and known to be such—for true, false allegations to the prejudice of the reputation of individuals — in a word, slander of all sorts — and that in all manner of ways, — by speech, by writing, and even in the way of printing, without the possibility of stopping his mouth, destroying his manuscript, or stopping the press.

What then? Does it follow, that because a man ought to be left at liberty to publish opinions of all sorts, subject not to previous prevention, but only to subsequent punishment, that therefore he ought to be left at equal liberty to publish allegations of all sorts, false as well as true — allegations known by him to be false, as well as allegations believed by him to be true — attacks which he knows to be false, upon the reputation of individuals, as well as those which he believes to be true? Far is it from my meaning to contend in this place, especially in a parenthesis, much more to take for granted, that the endurance of even these mischiefs, crying as they are, may not be a less evil than the subjecting the press to a previous censure, under any such restrictions on the exercise of that power as could be devised — at any rate, under any such as have ever hitherto been proposed. All I mean to say is, that whether a man ought or ought not to be left at liberty to publish private slander without the application of anything but subsequent punishment to stop the progress of it, it does not follow that it ought to be left in his power to publish such allegations, because it ought to be left in like manner in his power to publish whatever can come under the denomination of opinions. As for the word thoughts, which is put in a line with the word opinions, as if thoughts were something different from opinions, I shall lay it out of the question altogether, till I can find somebody who will undertake to satisfy me, in the first place, that it was meant to denote something in addition to opinions, and in the next place, that that something was meant to include allegations, true and false, in relation to matters of fact.

Is it, or is it not, a matter to be wished, in France for example, that measures were taken by competent authority—whatever authority be deemed competent, to draw the line between the protection due to the useful liberty, and the restraint proper for the pernicious licence of the press? What a precious task would the legislator find set for him by this declaration of sacred, inviolable, and imprescriptible rights! The protectors of reputation on one side of him: the idolators of liberty on the other: each with the rights of man in his mouth, and the dagger of assassination in his hand, ready to punish the smallest departure from the course marked out in his heated imagination for this unbending line.

ARTICLE XII.

The guarantee of the rights of the man and of the citizen necessitates a public force: this force is therefore instituted for the advantage of all, and not for the particular utility [advantage] *of those to whom it is intrusted.*

The general purpose of the whole performance taken together, being mischievous and pestilential, this article has thus much to recommend it, that it is nothing to the purpose — no declaration of inviolable rights — no invitation to insurrection. As it stands, it is a mere effusion of imbecility — a specimen of confused conception and false reasoning. With a little alteration, it might be improved into a common-place memento, as stale, and consequently as useless, as it is unexceptionable: to wit, that the employment given to the public force, maintained as it is at the expense of the public, ought to have for its object the general advantage of the whole body of the public taken together, not the exclusive private advantage of particular individuals.

This article is composed of two distinct propositions. In the first, after throwing out of it as so much surplusage, the obscure part about the guarantee or maintenance of the rights of the man and the citizen, there will remain a clear and intelligible part, a declaration of opinion asserting the necessity of a public force: to this, hooked on in the shape

of an inference, of a logical conclusion, a vague assertion of an historical matter of fact, which may have been true in one place, and false in another — the truth of which is incapable of being ascertained in any instance — an operation, the labour of which may be spared with the less loss, from its being nothing to the purpose.

This matter of fact is neither more nor less than the main end in view which happened to be present in the minds of the several persons to whose co-operation the public force was respectively indebted for its institution and establishment in the several political communities in the world, and which officiated in the character of a final cause in every such instance. This final cause, the penner of the article — such is his candour and good opinion of mankind — pronounces without hesitation or exception to have been the pure view of the greatest good of the whole community — public spirit in its purest form, and in its most extensive application. Neither Clovis, Pepin, nor Hugh Capet, had the smallest preferable regard to the particular advantage of themselves or their favourites, when they laid the foundations of the public force in France, nor any other consideration in view than what might be most conducive to the joint and equal advantage of the Franks, Gauls, and Gallo-Romans upon the whole. As little partiality existed in the breast of William the Conqueror, in favour of himself, or any of his Normans, on the occasion of his sharing out England among those Normans, and dividing it into knight's fees: freemen and villains, barons and yeomen, Normans, Danes, and English, collectively and individually, occupying one equal place in his affections, and engaging one equal portion of his solicitude.

According to this construction, the inference, it must be confessed, may be just enough. All you have to suppose is, that the greatest good of the whole community taken together was in every instance the ruling object of consideration in the breast of the institutors of the public force: the pursuit of that greatest good, in a certain shape not perfectly explained, being the ruling object with these worthy men. As they did institute this public force, it seems to follow pretty accurately that the attainment of that general advantage was the end in view, in each instance, of its being instituted.

Should the two propositions, the antecedent and the consequent, in this their genuine signification, appear too silly to be endurable, the way to defend it may be to acknowledge that the man who penned it knew no difference between a declaration of what he supposed was or is the state of things with regard to this or that subject, and a declaration of what he conceived ought to have been, or ought to be that state of things; and this being the case, it may be supposed that in saying such was the end in view upon the several occasions in question, what he meant was, that such it ought to have been. If this were really his meaning, the propositions are such, both of them, as we may venture to accede to without much danger. A public force is necessary, we may say; and the public is the party for whose advantage that force ought to be employed. The propositions themselves are both of them such, that against neither of them, surely, can any objection be produced: as to the inference by which they are strung together, if the application made of it be not exactly of the clearest nature, you have only to throw it out, and everything is as it should be, and the whole article is rendered unexceptionable.

ARTICLE XIII.

For the maintenance of the public force, and for the expenses of administration, a common contribution is indispensable: it ought to be equally divided among all the citizens in proportion to their faculties.

In the first part of this article two propositions are contained. One is, that a common contribution is indispensable for the maintenance of the public force. If by this be meant, that raising money upon all, for the maintenance of those whose individual forces are employed in the composition of the public force, is proper, I see no reason to dispute it: if the meaning be, that this is the only possible way of maintaining a public force, it is not true. Under the feudal system, those whose individual forces composed the public force, were maintained, not at the expense of the community at large, but at their own expense.

The other proposition is, that a common contribution is indispensable for the expenses (meaning the other expenses) of administration. Indispensable? Yes, certainly: so far as these other branches of administration cannot be carried on without expense — if they are carried on, the defraying of that expense is indispensable. But are these nameless branches of administration necessary? for if they are not, neither is a common contribution for the defraying of the expense. Are they then necessary? — these unnamed and unindicated branches of administration, which in this mysterious manner are put down on the list of necessary ones, is their title to be there a just one? This is a question to which it is impossible to find an answer: yet, till an answer be found for it, it is impossible to find a sufficient warrant for admitting this proposition to be true. From this proposition, as the matter stands upon the face of it, it should seem that one of these sacred and inviolable and imprescriptible rights of a man consists in the obligation of contributing to an unknown mass of expense employed upon objects not ascertained.

Proposition 3. It (the common contribution in question) ought to be equally divided amongst all the citizens, in proportion to their faculties.

Partly contradiction—a sequel to, or rather repetition of preceding contradictions: partly tyranny under the mask of justice.

By the first article, human creatures are, and are to be, all of them, on a footing of equality in respect to all sorts of rights. By the second article, property is of the number of these rights. By the two taken together, all men are and are to be upon an equal footing in respect of property: in other words, all the property in the nation is and is to be divided into equal portions. At the same time, as to the matter of fact, what is certain is, that at the time of passing this article, no such equality existed, nor were any measures so much as taken for bringing it into existence. This being the case, which of the two states of things is it that this article supposes?—the old and really existing inequality, or the new and imaginary equality? In the first case, the concluding or explanatory clause is in contradiction to the principal one: in the other case, it is tautological and superfluous. In the first case, the explanatory clause is in contradiction to the principal one; for, from unequal fortunes if you take equal contributions, the contributions are not proportional. If from a fortune of one hundred pounds you take a contribution of ten pounds, and from a fortune of two hundred pounds, ten pounds and no more, the proportion is not a tenth in both cases, but a tenth in the one, and only a twentieth in the other.

In the second case — that is, if equality in point of property be the state of things supposed—then, indeed, equality of contribution will be consistent with the plan of equalization, as well as consonant to justice and utility; but then the explanatory clause, *in proportion to their faculties*, will be tautologous and superfluous, and not only tautologous and superfluous, but ambiguous and perplexing: for proportionality in point of contribution is not consistent with equality in point of contribution, on more than one out of an infinity of suppositions, viz. that of equality in point of fortune: nor, in point of fact, was the one consistent with the other in the only state of things which was in existence at the time.

Men's *faculties* too! What does that word mean? This, if the state of things represented as actually existing, as well as always having existed, and for ever about to exist, had been anything more than a sick man's dream, would have required to be determined, had it been at all a matter of concern to prevent men from cutting one another's throats, and must have been determined before this theory could have been reduced to practice. In the valuation of men's faculties, is it meant that their possessions only, or that their respective wants and exigencies, as well as their ways and means, should be taken into account? In the latter case, what endless labour! in the former case, what injustice!

In either case, what tyranny! An inquisition into every man's exigencies and means, — an inquisition which, to be commensurate to its object, must be perpetual, — an inquisition into every man's circumstances, one of the foundation stones in this plan of liberty!

To a reader who should put an English construction upon this plan of taxation — (masked by the delusive term contribution, as if voluntary contributions could be a practicable substitute for compulsory,) — to a reader who should collect from the state of things in England the construction to be put upon this plan of taxation, the system here in view would not show itself in half its blackness. To an English reader it might naturally enough appear, that all that was meant was, that the weight of taxation should bear in a loose sense as equally, or rather as equitably — that is, as proportionably, as it could conveniently be made to do; — that taxes, a word which would lead him directly and almost exclusively to taxes upon consumption, should be imposed — for example, upon superfluities in preference to the necessaries of life. Wide indeed would be his mistake. What he little would suspect is, that taxes on consumption, the only taxes from which arise the contributions that in plain truth, and not in a sophistical sense, are voluntary on the part of the contributor, are carefully weeded out of the book of French finance. Deluded by the term *indirect*, imposed as a sort of term of proscriptiom upon them by a set of muddy-headed metaphysicians — little does he think that the favourite species of taxation in that country of perfect liberty, is a species of imposition and inquisition, which converts every man who has any property into a criminal in the first instance, which sends the tax-gatherer into every nook and corner of a man's house, which examines every man upon interrogatories, and of which a double or treble tithe would be an improved and mollified modification.

ARTICLE XIV.

All the citizens have the right to ascertain by themselves, or by their representatives, the necessity of the public contribution — to give their free consent to it — to follow up the application of it, and to determine the quantity of it, the objects on which it shall be levied, the mode of levying it and getting it in, and the duration of it.

Supposing the author of this article an enemy to the state, and his object to disturb

the course of public business, and set the individual members of the state together by the ears, nothing could have been more artfully or more happily adapted to the purpose. Supposing him a friend, and his object to administer either useful instruction or salutary controul, nothing more silly or childish can be imagined.

In the first place, who is spoken of—who are meant, by all the citizens? Does it mean all, collectively acting in a body, or every citizen, every individual, that is, any one that pleases? This right of mine, — is it a right which I may exercise by myself at any time whenever it happens to suit me, and without the concurrence of anybody else, or which I can only exercise if and when I can get everybody else, or at least the major part of everybody else, to join me in the exercise of it? The difference in a practical view is enormous; but the penners of this declaration, by whom terms expressive of aggregation, and terms expressive of separation, are used to all appearance promiscuously, show no symptoms of their being aware of the smallest difference. If in conjunction with everybody else, I have it already by the sixth article. Laws imposing contributions are laws: I have already, then, a right of concurring in the formation of all laws whatever: what do I get by acquiring the right of concurring in the formation of the particular class of laws which are employed in imposing contributions? As a specification, as an application of the general provision to the particular subject, it might be very well. But it is not given as a specification, but as a distinct article. What marks the distinction the more forcibly, is the jumbling in this instance, and in this instance only, acts of another nature with acts of legislation — the right of examining into the necessity of the operation, and of following up such examination with the right of performing the operation — the right of observing and commenting on the manner in which the powers of government are exercised, with the right of exercising them.

Make what you will of it, what a pretty contrivance for settling matters, and putting an end to doubts and disagreements! This, whatever it is, is one of the things which I am told I have a right to do, that is, either by myself, or by certain persons alluded to under the denomination of my representatives, —either in one way or the other; but in which? This is exactly what I want to know, and this is exactly what I am not told. — Can I do it by myself, or only by my representatives; that is to say, in the latter case by a deputy in whose election I have perhaps had a vote, perhaps not — perhaps given the vote, perhaps not — perhaps voted for, perhaps voted against; and who, whether I voted for or against him, will not do either this, or any one other act whatsoever, at my desire? Have I, an individual — have I in my individual capacity — a right when I please, to ascertain, that is, to examine into the necessity of every contribution established or proposed to be established? Then have I a right to go whenever I please, to any of the officers in the department of the revenue, — to take all the people I find under my command, — to put all the business of the office to a stand, — to make them answer all my questions, — to make them furnish me with as many papers or other documents as I desire to have? — You, my next neighbour, who are as much a citizen as I am, have as much of this right as I have. It is your pleasure to take this office under your command, to the same purpose at the same time. It is my pleasure the people should do what I bid them, and not what you bid them; it is your pleasure they should do what you bid them, and not what I bid them: — which of us is to have his pleasure? The answer is, — he who has the strongest lungs, or if that will not do, he who has the strongest hand. To give everything to the strongest hand is the natural result of all the tutoring, and all the checking and controuling of which this lecture on the principles of government is so liberal: but this is the exact result of that state of things which would have place, supposing there were no government at all, nor any such attempt as this to destroy it, under the notion of directing it.

The right of giving consent to a tax, — the right of giving consent to a measure, — is a curious mode of expression for signifying assent or dissent as a man thinks proper! It is surprising that a man professing and pretending to fix words — to fix ideas — to fix laws — to fix everything — and to fix them to all eternity, should fix upon such an expression, and should say the right of giving consent, instead of the right of giving a vote — the right of giving consent, and consent only, instead of the right of giving consent or dissent, or neither, as a man thinks proper.

ARTICLE XV.

Society has a right to demand from every agent of the public, an account of his administration.

Society? What is the meaning — what is the object here? Different, where it ought to be identical — identical, where it ought to be different — ever inexplicit — ever indeterminate, using as interconvertible, expressions which, for the purpose of precision and right understanding, require the most carefully to be set and kept in opposition: such is the language from the beginning of this composition to the end!

Is it, that superiors in office have a right to demand such an account of their subordi-

nates? Not to possess such a right, would be not to be a superior: — not to be subject to the exercise of it, would be not to be a subordinate. In this sense, the proposition is perfectly harmless, but equally nugatory. Is it, that all men not in office have this right with respect to all men, or every man in office? Then comes the question as before — each in his individual capacity, or only altogether in their collective? If in their collective, whatever this article, or any other article drawn up in the same view, does or can do for them, amounts to nothing: whatever it would have them do, it gives them no facilities for doing it, which they did not possess without it. Whatever it would have them do, if one and all rise for the purpose of doing it, bating what hindrance they may receive from one another, there will be nobody to hinder them. But is there any great likelihood of any such rising ever taking place? and if it were to take place, would there be any great use in it?

If the right be of the number of those which belongs to each and every man in his individual capacity, then comes the old story over again of mutual obstruction, and the obstruction of all business, as before.

The right of demanding an account? What means that, too? The right of simply putting the question, or the right of compelling an answer to it — and such an answer as shall afford to him that puts it, the satisfaction he desires? In the former case, the value of the right will not be great; in the latter case, he who has it, and who, by the supposition, is not in office, will in fact be in office; and, as everybody has it, and is to have it, the result is, that everybody is in office; and those who command all men are under the command of every man.

Instead of meaning stark nonsense, was the article meant after all simply to convey a memento to those who are superiors in office, to keep a good look-out after their subordinates? If this be the case, nothing can be more innocent and unexceptionable. Neither the child that is learning wisdom in his horn-book, nor the old woman who is teaching him, need blush to own it. But what has it to do in a composition, the work of the collected wisdom of the nation, and of which the object is, throughout and exclusively, to *declare rights?*

Silly or pestilential — such, as usual, is here the alternative. In the shape of advice, a proposition may be instructive or trifling, wholesome or insipid. But be it the one or the other, the instant it is converted, or attempted to be converted, into a law, of which those called legislators are to be the objects, and those not called legislators to be the executors, it becomes all sheer poison, and of the rankest kind.

ARTICLE XVI.

Every society in which the warranty of rights is not assured, ["*la garantie des droits n'est pas assurée,*"] *nor the separation of powers determined, has no constitution.*

Here we have an exhibition: self-conceit inflamed to insanity — legislators turned into turkey-cocks—the less important operation of constitution-making, interrupted for the more important operation of bragging. Had the whole human species, according to the wish of the tyrant, but one neck, it would find in this article a sword designed to sever it.

This constitution, — the blessed constitution, of which this matchless declaration forms the base—the constitution of France — is not only the most admirable constitution in the world, but the only one. That no other country but France has the happiness of possessing the sort of thing, whatever it be, called a constitution, is a meaning sufficiently conveyed. This meaning the article must have, if it have any: for other meaning, most assuredly it has none.

Every society in which the warranty of rights is not assured (*toute société dans laquelle la garantie des droits n'est pas assurée,*) is, it must be confessed, most rueful nonsense; but if the translation were not exact, it would be unfaithful: and if not nonsensical, it would not be exact.

Do you ask, has the nation I belong to such a thing as a constitution belonging to it? If you want to know, look whether a declaration of rights, word for word the same as this, forms part of its code of laws; for by this article, what is meant to be insinuated, not expressed (since by nonsense nothing is expressed,) is the necessity of having a declaration of rights like this set by authority in the character of an introduction at the head of the collection of its laws.

As to the not absolutely nonsensical, but only very obscure clause, about a society's having "the separation of powers determined," it seems to be the result of a confused idea of an intended application of the old maxim, *Divide et impera:* the governed are to have the governors under their governance, by having them divided among themselves. A still older maxim, and supposing both maxims applied to this one subject, I am inclined to think a truer one, is, that a house divided against itself cannot stand.

Yet on the existence of two perfectly independent and fighting sovereignties, or of three such fighting sovereignties (the supposed state of things in Britain seems here to be the example in view,) the perfection of good government, or at least of whatever approach to good government can subsist without the actual adoption *in terminis* of a declaration of rights such as this, is supposed to

depend. Hence, though Britain have no such thing as a constitution belonging to it at present, yet, if during a period of any length, five or ten years for example, it should ever happen that neither House of Commons nor House of Lords had any confidence in the King's Ministers, nor any disposition to endure their taking the lead in legislation (the House of Commons being all the while, as we must suppose, peopled by universal suffrage,) possibly in such case, for it were a great deal too much to affirm, Britain might be so far humoured as to be allowed to suppose herself in possession of a sort of thing, which, though of inferior stuff, might pass under the name of a constitution, even without having this declaration of rights to stand at its head.

That Britain possesses at present anything that can bear that name, has by Citizen Paine, *following*, or *leading* (I really remember not, nor is it worth remembering,) at any rate *agreeing* with this declaration of rights, been formally denied.

According to general import, supported by etymology, by the word *constitution*, something *established*, something *already* established, something possessed of *stability*, something that has given *proofs* of stability, seems to be implied. What shall we say, if of this most magnificent of all boasts, not merely the simple negative, but the direct converse should be true? and if instead of France being the only country which has a constitution, France should be the only country that has none! Yet if government depend upon obedience — the stability of government upon the permanence of the disposition to obedience, and the permanence of that disposition upon the duration of the habit of obedience — this most assuredly must be the case.

ARTICLE XVII.

Property being an inviolable and sacred right, no one can be deprived of it, unless it be when public necessity, legally established, evidently requires it [i. e. *the sacrifice of it,*] *and under the condition of a just and previous indemnity.*

Here we have the concluding article in this pile of contradictions; it does not mismatch the rest. By the first article, all men are equal in respect of all sorts of rights, and so are to continue for evermore, spite of everything which can be done by laws. By the second article, property is of the number of those rights. By this seventeenth and last article, no man can be deprived of his property — no, not of a single atom of it, without an equal equivalent paid — not when the occasion calls for it, for that would not be soon enough, but beforehand: all men are equal in respect of property, while John has £50,000 a-year, and Peter nothing: all men are to be equal in property, and that for everlasting; at the same time that he who has a thousand times as much as a thousand others put together, is not to be deprived of a single farthing of it, without having first received an exact equivalent.

Nonsense and contradiction apart, the topic touched upon here is one of those questions of detail that requires to be settled, and is capable of being settled, by considerations of utility deducible from quiet and sober investigation, to the satisfaction of sober-minded men; but such considerations are far beneath the attention of these creators of the rights of man.

There are distinctions between species of property which are susceptible, and species of property which are not susceptible, of the *value of affection;* between losses in relation to which the adequacy of indemnification may be reduced to a certainty, and losses in respect of which it must remain exposed to doubt: there may be cases in which a more than equivalent gain to one individual will warrant the subjecting another individual, with or without compensation, to a loss. All these questions are capable of receiving a solution to the satisfaction of a man who thinks it worth his while to be at the pains of comparing the feelings on one side with the feelings on the other, and to judge of regulations by their effect on the feelings of those whom they concern, instead of pronouncing on them by the random application of declamatory epithets and phrases.

Necessity? What means necessity? Does necessity order the making of new streets, new roads, new bridges, new canals? A nation which has existed for so many ages with the stock of water-roads which it received from Nature, — is any addition to that stock *necessary* to the continuation of its existence? If not, there is an end to all improvement in all these lines. In all changes there are disadvantages on one side, there are advantages on the other: but what are all the advantages in the world, when set against the *sacred* and inviolable rights of man derived from the unenacted and unrepealable laws of Nature?

CONCLUSION.

On the subject of the fundamental principles of government, we have seen what execrable trash the choicest talents of the French nation have produced.

On the subject of chemistry, Europe has beheld with admiration, and adopted with unanimity and gratitude, the systematic views of the same nation, supported as they were by a series of decisive experiments and conclusive reasonings.

Chemistry has commonly been reckoned, and not altogether without reason, among the most abstruse branches of science. In

chemistry, we see how high they have soared above the sublimest knowledge of past times; in legislation, how deep they have sunk below the profoundest ignorance: — how much inferior has the maturest design that could be furnished by the united powers of the whole nation proved, in comparison of the wisdom and felicity of the chance-medley of the British Constitution.

Comparatively speaking, a select few applied themselves to the cultivation of chemistry — almost an infinity, in comparison, have applied themselves to the science of legislation.

In the instance of chemistry, the study is acknowledged to come within the province of science: the science is acknowledged to be an abstruse and difficult one, and to require a long course of study on the part of those who have had the previous advantage of a liberal education; whilst the cultivation of it, in such manner as to make improvements in it, requires that a man should make it the great business of his life; and those who have made these improvements have thus applied themselves.

In chemistry there is no room for passion to step in and to confound the understanding — to lead men into error, and to shut their eyes against knowledge: in legislation, the circumstances are opposite, and vastly different.

What, then, shall we say of that system of government, of which the professed object is to call upon the untaught and unlettered multitude (whose existence depends upon their devoting their whole time to the acquisition of the means of supporting it,) to occupy themselves without ceasing upon all questions of government (legislation and administration included) without exception — important and trivial, — the most general and the most particular, but more especially upon the most important and most general — that is, in other words, the most scientific — those that require the greatest measures of science to qualify a man for deciding upon, and in respect of which any want of science and skill are liable to be attended with the most fatal consequences?

What should we have said, if, with a view of collecting the surest grounds for the decision of any of the great questions of chemistry, the French Academy of Sciences (if its members had remained unmurdered) had referred such questions to the Primary Assemblies?

If a collection of general propositions, put together with the design that seems to have given birth to this performance — propositions of the most general and extensive import, embracing the whole field of legislation — were capable of being so worded and put together as to be of use, it could only be on the condition of their being deduced in the way of abridgment from an already formed and existing assemblage of less general propositions, constituting the tenor of the body of the laws. But for these more general propositions to have been abstracted from that body of particular ones, that body must have been already in existence: the general and introductory part, though placed first, must have been constructed last; — though first in the order of communication, it should have been last in the order of composition. For the framing of the propositions which were to be included, time, knowledge, genius, temper, patience, everything was wanting. Yet the system of propositions which were to include them, it was determined to have at any rate. Of time, a small quantity indeed might be made to serve, upon the single and very simple condition of not bestowing a single thought upon the propositions which they were to include: and as to knowledge, genius, temper, and patience, the place of all these trivial requisites was abundantly supplied by effrontery and self-conceit. The business, instead of being performed in the way of abridgment, was performed in the way of anticipation — by a loose conjecture of what the particular propositions in question, were they to be found, might amount to.

What I mean to attack is, not the subject or citizen of this or that country — not this or that citizen — not citizen Sieyes or citizen anybody else, but all anti-legal rights of man, all declarations of such rights. What I mean to attack is, not the execution of such a design in this or that instance, but the design itself.

It is not that they have failed in their execution of the design by using the same word promiscuously in two or three senses — contradictory and incompatible senses — but in undertaking to execute a design which could not be executed at all without this abuse of words. Let a man distinguish the senses — let him allot, and allot invariably a separate word for each, and he will find it impossible to make up any such declaration at all, without running into such nonsense as must stop the hand even of the maddest of the mad.

Ex uno, disce omnes — from this declaration of rights, learn what all other declarations of rights — of rights asserted as against government in general, must ever be, — the rights of anarchy — the order of chaos.

It is right I should continue to possess the coat I have upon my back, and so on with regard to everything else I look upon as my property, at least till I choose to part with it.

It is right I should be at liberty to do as I please — it would be better if I might be permitted to add, whether other people were pleased with what it pleased me to do or not. But as that is hopeless, I must be content with such a portion of liberty, though it is

the least I can be content with, as consists in the liberty of doing as I please, subject to the exception of not doing harm to other people.

It is right I should be secure against all sorts of harm.

It is right I should be upon a par with everybody else—upon a par at least; and if I can contrive to get a peep over other people's heads, where will be the harm in it?

But if all this is right now, at what time was it ever otherwise? It is now naturally right, and at what future time will it be otherwise? It is then unalterably right for everlasting.

As it is right I should possess all these blessings, I have a right to all of them.

But if I have a right to the coat on my back, I have a right to knock any man down who attempts to take it from me.

For the same reason, if I have a right to be secure against all sorts of harm, I have a right to knock any man down who attempts to harm me.

For the same reason, if I have a right to do whatever I please, subject only to the exception of not doing harm to other people, it follows that, subject only to that exception, I have a right to knock any man down who attempts to prevent my doing anything that I please to do.

For the same reason, if I have a right to be upon a par with everybody else in every respect, it follows, that should any man take upon him to raise his house higher than mine, —rather than it should continue so, I have a right to pull it down about his ears, and to knock him down if he attempt to hinder me.

Thus easy, thus natural, under the guidance of the selfish and anti-social passions, thus insensible is the transition from the language of utility and peace to the language of mischief. Transition, did I say? — what transition?—from right to right? The propositions are identical — there is no transition in the case. Certainly, as far as words go, scarcely any: no more than if you were to trust your horse with a man for a week or so, and he were to return it blind and lame: — it was your horse you trusted to him — it is your horse you have received again: — what you had trusted to him, you have received.

It is in England, rather than in France, that the discovery of the *rights of man* ought naturally to have taken its rise: it is we — we English, that have the better *right* to it. It is in the English language that the transition is more natural, than perhaps in most others: at any rate, more so than in the French. It is in English, and not in French, that we may change the sense without changing the word, and, like Don Quixote on the enchanted horse, travel as far as the moon, and farther, without ever getting off the saddle. One and the same word, right — right, that most enchanting of words — is sufficient for operating the fascination. The word is ours, — that magic word, which, by its single unassisted powers, completes the fascination. In its adjective shape, it is as innocent as a dove: it breathes nothing but morality and peace. It is in this shape that, passing in at the heart, it gets possession of the understanding: — it then assumes its substantive shape, and joining itself to a band of suitable associates, sets up the banner of insurrection, anarchy, and lawless violence.

It is right that men should be as near upon a par with one another in every respect as they can be made, consistently with general security: here we have it in its adjective form, synonymous with desirable, proper, becoming, consonant to general utility, and the like. I have a right to put myself upon a par with everybody in every respect: here we have it in its *substantive* sense, forming with the other words a phrase equivalent to this, — wherever I find a man who will not let me put myself on a par with him in every respect, it is right, and proper, and becoming, that I should knock him down, if I have a mind to do so, and if that will not do, knock him on the head, and so forth.

The French language is fortunate enough not to possess this mischievous abundance. But a Frenchman will not be kept back from his purpose by a want of words: the want of an adjective composed of the same letters as the substantive *right*, is no loss to him. Is, has been, ought to be, shall be, can, — all are put for one another — all are pressed into the service—all made to answer the same purposes. By this inebriating compound, we have seen all the elements of the understanding confounded, every fibre of the heart inflamed, the lips prepared for every folly, and the hand for every crime.

Our right to this precious discovery, such as it is, of the rights of man, must, I repeat it, have been prior to that of the French. It has been seen how peculiarly rich we are in materials for making it. *Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters, "gorgons and chimæras dire." And thus it is, that from *legal rights*, the offspring of law, and friends of peace, come *anti-legal rights*, the mortal enemies of law, the subverters of government, and the assassins of security.

Will this antidote to French poisons have its effect? — will this preservative for the understanding and the heart against the fascination of sounds, find lips to take it? This, in point of speedy or immediate efficacy at least,

is almost too much to hope for. Alas! how dependent are opinions upon sound! Who shall break the chains which bind them together? By what force shall the associations between words and ideas be dissolved — associations coeval with the cradle — associations to which every book and every conversation give increased strength? By what authority shall this original vice in the structure of language be corrected? How shall a word which has taken root in the vitals of a language be expelled? By what means shall a word in continual use be deprived of half its signification? The language of plain strong sense is difficult to learn; the language of smooth nonsense is easy and familiar. The one requires a force of attention capable of stemming the tide of usage and example; the other requires nothing but to swim with it.

It is for education to do what can be done; and in education is, though unhappily the slowest, the surest as well as earliest resource. The recognition of the nothingness of the laws of nature and the rights of man that have been grounded on them, is a branch of knowledge of as much importance to an Englishman, though a negative one, as the most perfect acquaintance that can be formed with the existing laws of England.

It must be so: — Shakspeare, whose plays were filling English hearts with rapture, while the drama of France was not superior to that of Caffraria, — Shakspeare, who had a key to all the passions and all the stores of language, could never have let slip an instrument of delusion of such superior texture. No: it is not possible that the rights of man — the natural, pre-adamitical, ante-legal, and anti-legal rights of man — should have been unknown to, have been unemployed by Shakspeare. How could the Macbeths, the Jaffiers, the Iagos, do without them? They present a cloak for every conspiracy — they hold out a mask for every crime; — they are every villain's armoury — every spendthrift's treasury.

But if the English were the first to bring the rights of man into the closet from the stage, it is to the stage and the closet that they have confined them. It was reserved for France — for France in her days of degradation and degeneration — in those days, in comparison of which the worst of her days of fancied tyranny were halcyon ones — to turn debates into tragedies, and the senate into a stage.

The mask is now taken off, and the anarchist may be known by the language which he uses.

He will be found *asserting rights*, and acknowledging them at the same time not to be recognised by government. Using, instead of *ought* and *ought not*, the words *is* or *is not* — *can* or *can not*.

In former times, in the times of Grotius and Puffendorf, these expressions were little more than improprieties in language, prejudicial to the growth of knowledge: at present, since the French Declaration of Rights has adopted them, and the French Revolution displayed their import by a practical comment, — the use of them is already a *moral crime*, and not undeserving of being constituted a legal crime, as hostile to the public peace.

DECLARATION OF THE RIGHTS AND DUTIES

OF THE

MAN AND THE CITIZEN,

ANNO 1795.

RIGHTS. — ARTICLE I.

The rights of man in society are liberty, equality, security, and property.

Comparing this declaration with its predecessor, we may observe, that it opens with a specimen of legislative shuffling: on the one hand, a sense of the absurdity of its predecessor, and the mischief that had been the fruit of it: on the other hand, a determination not to acknowledge these things.

The sorts of rights which this second declaration, as well as the first, sets out with the intention of declaring, are of two sorts: those of the man, and those of the citizen: those which it immediately proceeds to declare are neither the one nor the other, but something between both, — *the Rights of Man in Society.*

The difference is not a mere affair of words. The rights declared by the first declaration, were declared to be natural, inalienable, and

imprescriptible — such rights, against which all laws that should at any time presume to strike, would become *ipso facto* void. If no distinction were to be recognised between the rights of the man and the rights of the citizen, one of the expressions must be acknowledged to be unmeaning, and the insertion of it a dangerous impertinence: if a distinction between them be to be recognised, it must be this, that the rights of the man — the rights of the man as existing in a state antecedent to that of political society — antecedent to the state of citizenship — are the only one of the sorts to which the character of inalienable and imprescriptible can be understood to belong: — those of the citizen, growing out of the laws by which the state of citizenship is constituted, are the produce of the law itself, and may be conceived to remain at the disposal of the law which gave them birth, and may continue to depend for their existence on the law from which they received it.

This second declaration, — leaving the doubt in its full force, whether there are or are not a certain description of rights over which laws have no power — a description of rights which, as we have seen, covers the whole field of legislation, shutting the door against everything that can present itself under the name of law? — consequently, whether such laws as they are about to create are or are not capable of possessing any binding force, — varnishes over the ambiguity by a subterfuge. Obliterating the distinction so carefully made, and so recently recognised between the man and the citizen, at the next step they produce, instead of the two, a sort of neutral double man, who is neither one nor the other, or else both in one.

Comparing the list of rights, whoever they belong to, whether to the man or the citizen, or the man in society, we shall find, that between the year 1791 and the year 1795, inalienable as they are, they have undergone a change. Indeed, for a set of inalienable rights they must be acknowledged to have been rather unstable. At the time of the passing the first article of the declaration of 1791, there were but two of them — liberty and equality. By the time the second article of that same declaration was framed, three new ones had started up in addition to liberty; viz. property, security, and resistance to oppression: total, four sorts of rights — not five; for in the same interval an accident had happened to equality, and somehow or other it was not to be found. In the interval between 1791 and 1795, it has been found again: accordingly, in the list of 1795, we may observe equality occupying a station elevated above everything but liberty, with security and property lying at its feet. Looking for resistance against oppression, we shall find it kicked out of doors; but, like the images of the two illustrious Romans mentioned by Tacitus, not the less regarded for not being seen. To account for this exclusion, we must recollect, that between 1791 and 1795 — in short, from the moment of his naturalization (for it was in America that he had his birth) Citizen Resistance - against - oppression had been playing strange tricks: he had been constantly flying in the face of the powers in being, whatever they were — he had rendered himself a perfect nuisance, and so great a nuisance, that it was high time for him to be sent to Coventry. Thither he has accordingly been sent, though ready to present himself at the call of patriotism, whenever a king is to be assassinated, or a riot to be kicked up. By the sagacity of the constitutionalist of 1795, he had been at length discovered to be a most dangerous enemy to security, after a four years' experience of his activity in that line. Two years before his naturalization in France, I had denounced him as such in a book* which found its way into the hands of Condorcet and others; but my denunciation was not heard.

As to the rest, the nonsensicalness and mischievousness of this article has been pointed out in the observations on the corresponding article of the declaration of 1791.

ARTICLE II.

Liberty consists in the power of doing that which hurts not the rights *of others.*

The same as the commencement of Article IV. in the Declaration of 1791, except as to the insertion of the words — *the rights.*

ARTICLE III.

Sentence 1. *Equality consists in this — that the law is the same for all, whether it protect or whether it punish.*

Sentence 2. *Equality admits not any distinction of births — any hereditary succession of powers.*

In article 6 of the Declaration of 1791, we saw this given in the character of a maxim; in which character the propriety of it has been discussed: the maxim is now turned into a definition of equality. This is equality, certainly, as far as it goes; but is it to be understood as stopping here, or is it to go any further, and how much further? These questions are not answered, apparently because the declaration-makers were afraid to answer them. Thus much is certain, there is nothing in this declaration of rights to stop it: therefore, on it must go in its own course; which course can never have found its end, till it has laid everything smack smooth, not leav-

* *Introduction to the Principles of Morals and Legislation*, first published 1789. See Vol. I. p. 154.

ing any one stone in the whole fabric of property upon another.*

That equality should leave no hereditary succession of powers, is natural and consistent enough. But how does it contrive to leave any powers at all? Where is the equality between him who has powers, and him who has none? The exclusion of the hereditary succession of powers excepted, it turns out, then, that people are not the more upon a par for the possession of this right; and that, in short, to speak correctly, equality and inequality are the same things.

No distinction of births — no distinction in point of birth? How is that managed? Are all the men in France born of the same father and mother? Will democratic omnipotence prevent the Montmorencies from being descended from a known line of ancestors, beginning under the Capets? or, I forget what other family, from a line beginning under Clovis? What they probably meant to say is, that no distinction in point of rights should be suffered to depend on any distinction in point of birth: but as epigrams are at least as necessary in a French book of legislation as laws, the paradoxical turn of expression was preferred, as being the most natural.

ARTICLE IV.

Security results from the concurrence of all in securing the rights of each.

An epigram upon security — a definition imitated from *le malade imaginaire*. The property which opium has of laying men to sleep, results from its soporific quality. Now, citizen, if you do not know what security is, you deserve to have your house knocked down about your ears.

Concurrence of all on one hand — rights of each on the other. From this antithesis we learn, that whatever security happens to be conferred by the exertions of any number less than all, is no security at all.

ARTICLE V.

Property is the right of enjoying and disposing of one's goods — of one's revenues — of the fruit of one's labour and one's industry.

Another definition in the soporific style, but perhaps not quite so innocent. Property is the right of enjoyment and disposal. Let a man, then, have ever so much of either right, yet if he have not the other, he has no property. It is perhaps owing to this definition of property, that what the *ci-devant* clergy of France had to live upon, was not their property, and consequently there was no harm in robbing them of it. In England, tenant for life of a settled estate conceives himself to be a man of property: this article informs him that he knows nothing about the matter. In England, a woman who has an advowson, conceives the advowson to be her property. let her consult these French legislators, they will tell her it is no such thing, since she cannot give herself the living.

Let us pass on to the Declaration of the Duties of Man.

Right being one of the fruits of law, and duty another, it occurred to the second set of constitution-makers, that a *declaration of rights* would be but a *lop-sided job*, without a *declaration of duties* to match it on the other side. The first declaration of rights having driven the people mad, a declaration of duties, it was hoped, might help to bring them to their senses. Whatever were their notions about the matter, thus much must be admitted to be true, that if poison *must* be taken, an antidote may have its use; but what would be still better would be, to throw both together, poison and antidote, into the fire. Every medicine that is good for anything, say the physicians, is a poison. The political medicine we have now to analyze, forms no exception to the rule.

What seems to have been no better understood by the second set of constitution-makers than by the first, is, that rights and duties grow on the same bough, and are inseparable; that so sure as rights are created, duties are created too; and that though you may make duties without making rights (which is in fact the result of the alas! but too numerous catalogue of laws by which nobody is the better,) yet to make rights without making duties is impossible. As deep judges of legislative composition as Monsieur Jourdan, who talked prose without knowing it, it seems to have escaped their observation, that in making rights (under pretence of dealing them out ready made) they were making duties without knowing anything about the matter.

ARTICLE I., OR PREAMBLE.

The Declaration of Rights contains the obligations of legislators: — the maintenance of society requires that those who compose it, know and fulfil equally their *duties.*

Whether by *duties*, in the latter part of the sentence, were meant exactly the same things as by *obligations* in the first, I will not take upon me absolutely to determine: — if it were, it will furnish one amongst so many other proofs, how insensible these masters of legislation are of the value of useful precision, in comparison with fancied elegance.

ARTICLE II.

All the duties of the man and the citizen are derived from these two principles, engraven by nature in all breasts, in the hearts of all men,—

Do not to another that which you would not men should do to you.

* See *Essay on the Levelling System*, Vol. I. p. 358.

Do constantly to others the good which you would receive from men.

The known source of this double-headed precept is the New Testament: "Whatsoever ye would that men should do unto you, do ye even so unto them." Do as you would be done by, says the abridged expression of it, as given by the English proverb. What improvement the precept has received from the new edition given of it by the anti-christian hand, will presently appear.

A division is here made of it into two branches, a negative and a positive: — the tendency of the negative, placed where it is, is pernicious; — the tendency of the positive branch, worded as it is, absurd, and contrary to the spirit of the original: — the former, for want of the limitations necessary to the application here made of it, is too ample; the latter, by the tail clumsily tacked on to it, is made too narrow.

In what country is it, that it is the wish of accusers to be accused — of judges to be condemned — of guillotiners to be guillotined? In Topsyturvy-land, where cooks are roasted by pigs, and hounds hunted by hares; in that same land, a law thus worded might do no harm; and government might go on as well with it as without it. In France, thus much is clear, that whatsoever individual prosecutes a delinquent — whatsoever judge condemns him — whatsoever subordinate minister of justice executes the sentence of the judge, is a transgressor of this law — this fundamental law — given without reservation or exception — said to be engraven, just as we see it, in all hearts, and placed first in the list of duties.

Morality, not affecting precision, addresses itself to the heart: law, of which precision is the life and soul, addresses itself to the head.

The positive branch of the precept, under the necessity, it should seem, of rounding the period and making the line run well, is so worded as to shut the door against generosity. Do to a man that good. What good? Why, exactly and constantly just that very good which you want him to do to you. And if you happen not to want anything of him, what then? why then let him want, and welcome. There is nothing in this rule of law that can afford him a handle to take hold of, should he be inclined to accuse you of a breach of this fundamental duty. If you want a twopenny loaf, for example, go to the baker, and give him either a twopenny loaf or twopence: — in the first case, you fulfil the letter — in the latter, the spirit of the law. Should you see a man starving for want of such a loaf, let him starve, and welcome: — you want nothing of him, not you, — neither the twopenny loaf nor the twopence: let him starve on; there is nothing he can indict you upon in this law.

ARTICLE IV.

No one is a good citizen if he be not a good son, a good father, a good brother, a good friend, a good husband.

Good — as good as any other good thing that has been said a thousand times over in a novel or a play — silly as a law — scarcely reconcilable to the next preceding article, and not altogether reconcilable to the interests of the community at large.

The word *civil* gives name to one class of duties — the word *domestic*, to another. Is it impossible to violate one law without violating another? Does a man, by beating his wife, defraud the revenue? Does a man, who smuggles coffee, beat his wife? Brutus — the elder Brutus — who under a government where the father had the powers of life and death over the child, put his sons to death for conspiracy against the government, — he a bad citizen? or does goodness in a father consist in putting his children to death?

A friend of Lord Monteagle's was engaged with Guy Fawkes and others in a conspiracy for blowing up the legislature. Under this fourth article and the third, what should Monteagle have done? The third bids him discover the plot; for it bids him defend and serve the society and the laws, thus threatened with destruction by the plot: — the fourth bids him say nothing about the matter; for what could he say about it that would not endanger the safety of his friend. If Monteagle had happened to be a well-wisher to the conspiracy, and desirous of concealing it, what could he have desired for his security better than such a clause?

ARTICLE V.

No man is a good man if he be not frankly and religiously an observer of the laws.

Of the laws? — of what laws? — of all laws? — of all laws present and to come, whatsoever they may forbid, whatsoever they may enjoin? A religious observer of the laws which proscribe his religion — the only religion he thinks true — and bid him drag to judicial slaughter those who exercise it? To talk of religion — except in the way of rhetorical flourish — in the style which is here conceived to be the proper style for law, may perhaps be deemed on this occasion an abuse of words. Well, then: the men of September, or, since they are out of power, the men of the 10th of August, or the conquerors of the Bastile were they good men? — were they frank and religious observers of the law, declaring and enacting the inviolability of the king? The question may seem puzzling; but a former passage will help us to a solution. By articles XVIII. and XX. of the Declaration of Rights, a law is no law unless made by democracy run mad — made by men, women, and chil-

dren,—convicts, madmen, and so on,—mediately or immediately. Here, then, we have a clue:—in a democracy run mad, goodness means submission to the laws: under every other sort of government, goodness means rebellion.

ARTICLE VI.

He who openly violates the law, declares himself in a state of war with society.

More very decent *clappable* matter for the stage: in a book of law, preciously absurd, and not a little dangerous.

To be in a state of war is to be in that state in which the business of each party is to kill the other.

In kindness to one set of button-makers, we have a silly law in England, condemning the whole country to wear now and for everlasting a sort of buttons they do not like. A more silly law can scarcely be imagined: but laws of a similar stamp are but too plentiful in Great Britain; and France will have good luck indeed, if laws of similar complexion do not, in spite of every exertion of democratic wisdom, find their way into France. In London you may see every day, in any street, men, women, and children, violating these and other such wholesome laws, knowingly or unknowingly, with sufficient openness. Since all these wicked uncivic button-wearers have declared war against society, what say you, Citizen Legal-epigram-maker, the penner of this declaration—what say you to a few four-and-twenty pounders filled with grape-shot, to clear the streets of them?

ARTICLE VII.

He who, without openly infringing the laws, eludes them by cunning or address, wounds the interests of all; he renders himself unworthy of their benevolence and their esteem.

As to the truth of this proposition, whether the eluding the observance of a law be or be not prejudicial to anybody, depends upon the nature of the law: if the law be one of those which are of no use to anybody, the eluding of it does no harm to anybody; if it be one of those which are of use to this or that description of persons, and that only, the eluding of it may be a prejudice to them, but does no harm to anybody else.

Were the law of libel, as it stands in England, to be obeyed without infraction, there would be no more liberty of discussion, publication, or discourse on political subjects, in England, than there is on religious subjects in Spain: were it executed in every instance of its being infringed, there would not be a man or a woman in England, who had eyes or ears, out of jail. The law of England, taking it with all its faults, is probably at least as near perfection upon the whole as the law of any other country: at the same time, were any good to come of it, I would engage to find laws in it, by dozens and by scores, any one of which, if generally obeyed, or at least if constantly executed, would be enough to effect the destruction of the country, and render it miserable.

Things being in this state, there seems unhappily no help for it, but that it must be left to each man's conscience in respect to what laws he shall be forward, and to what backward, to pay obedience, and lend his hand to execute. While matters are in this imperfect state, indiscriminate obedience is no more to be insisted on with regard to laws in any country, than, under a limited monarchy, passive obedience is with regard to kings.

To judge by these three last articles of the Declaration of Duties of the Man and the Citizen, the compositor seems to have been rather hardly put to it to fill up the requisite quantity of paper. Rights of man present themselves in sufficient plenty; but when he comes to duties, it becomes apparent that when a man has said it is your duty to obey the laws, he has said all that is to be said about the matter. Accordingly, the contents of these three articles are not any addition to the list of duties, but observations on the subject, consisting of a string of epigrams and fine speeches fit for plays.

In regard to offences, the great difficulty is, and the great study ought to be, to distinguish them from one another: the business of this article is to confound them. In England, simple disobedience is one thing—rebellion (technically, but rather improperly, called treason) another: the punishment of the one, where no special punishment is appointed, is a slight fine, or a short imprisonment; that of the other, capital. In France, under the auspices of this declaration, these trifling differences are not thought worth noticing:—disobedience and rebellion are discovered to be the same thing. The state of the laws in France must be superior not only to what it has ever been during the revolutionary anarchy, but to what it ever has been during the best times of French history, or of the history of any other country of considerable extent, if there be a single day in any year in which scores of laws have not been transgressed, and that openly, by thousands and tens of thousands of individuals. If this be true, the effect of this single article must be, that after the restoration of peace, and the perfect establishment of the best of all possible constitutions, the habitual state of France will be a state of civil war.

In the codes of other countries, the great end of government is to quiet and repress the dissocial passions: in France, the great study is to inflame and excite them; it is so when declaring rights . it is so when declaring

duties. Under this code, to be a true Frenchman, a man must be for ever in a passion: — ever ready to cut either his own or his neighbour's throat. Whatever may be the subject with which this constitution commences, it ends in anarchy. Under this régime, there appears no difference between a tragedy and a law, in respect to style: fine sentiments, epigrams, *chaleur mouvement*, are equally indispensable in both. Every tragedy must be levelled at some law — every law must read like a tragedy — every law must end in a tragedy.

ARTICLE VIII.

On the maintenance of property rests the cultivation of the lands, all the productions, every means of labour, and the whole fabric of social order.

The article, as thus worded, reads bold enough, and if it were less so, it would not be faithful. It presents a striking picture of the penman. His budget of duties emptied, his subject exhausted, and what is more, even his stock of fine speeches, yet he cannot persuade himself to stop. He would fain persuade his fellow-citizens to pay respect to property, by appealing to their love of country work and its productions; and if they have no regard for these things, to their love of work in general; and if labour have no charms for them, as a last resource, to their love of social order.

ARTICLE IX.

Every citizen owes his services to his country, to the maintenance of liberty, equality, and property, as often as the law calls upon him to defend them.

This is the last in this list of duty-declaring articles; and the conclusion of this short but superfluous composition is of a piece with the beginning,—full of uncertainty, obscurity, and danger.

Every citizen owes his services to his country, &c. Owes services? What services? for what time? and upon what terms? Military services? for soldier's pay, and for life? If this were *not* meant, nothing can be easier than for any legislature—any administration—any administrator — any recruiting sergeant, to give it that meaning. *Property* we have seen already secured by double and treble tether: *Liberty* is here secured by a system of universal *crimping*. In England, pressing is still looked upon as a hardship, though no man is liable to be pressed, who has not voluntarily engaged in a profession which he knows will subject him to it. What should we say in England, were an act of Parliament to be passed, in virtue of which all individuals without exception, all ages and professions, sick and well, married and single, housekeepers and lodgers, lawyers, clergymen, and quakers, were liable to be pressed for soldiers—women perhaps into the bargain? — since in France, women's necks have been found to fit the guillotine as well as men's, and in England, thanks to the sages of the law, women make good constables.

Equality also is to be maintained, as well as property. Equality without limitation, and that by everybody, at the call of anybody. The distribution of property being at the time of issuing this declaration, prodigiously unequal — as much at least as in many a monarchy, — how are equality and property to be there at the same time?

The maintenance of both being incompatible, — to choose which of the two shall be maintained, since both cannot be maintained together, seems to be left to the wisdom of the citizens, rich and poor, industrious or idle, full or fasting, as occasion may arise. To a considerable majority, the maintenance of equality will probably be the pleasanter task of the two, as well as the more profitable.

OBSERVATIONS

ON

PARTS OF THE DECLARATION OF RIGHTS,

AS

PROPOSED BY CITIZEN SIEYES.

One general imperfection runs through the whole of this composition. The terms employed leave it continually in doubt whether it be meant to be prospective merely, or retrospective also, — whether it mean solely to declare what shall be the state of the law after the moment of the enactment of this declaration, or likewise what has been its state previous to that moment. To judge from the words, it should seem almost everywhere to include this retrospect. The objections to such retrospective declaration are — 1. That it is notoriously untrue; — 2. That the untruth of it is supposed by the very act of enacting the declaration; since if what is there established were already established, there would be no use for establishing it anew; — 3. That the declaration of the past existence of the provisions in question would be of no use, though the matter of fact were true.

"*Every society cannot but be the free work of a convention entered into between all the associated* [members.]"

Hence it appears that there never has yet been such a thing as a society existing in the world. This is the first and most fundamental of all the fundamental truths, for the discovery of which the blind and obstinate world is indebted to Citizen Sieyes. Here live we, somehow or other, in Great Britain. It seems to us that we are living in society; but Citizen Sieyes, who knows everything, and everything in his own way, knows it is no such thing. What sort of a state is it we are living in, if we really do live? To know this, we must wait till a word has been assigned as suited to our wretched condition, adapted to express the miserable state we live in, by the grace and ingenuity of Citizen Sieyes. But do we live, after all? Whether we do or no, is at least as doubtful as whether we are in society; whether the state we are in, living or not living, be a state of society.

Is Citizen Sieyes living? To judge by Bickerstaff's test, this were matter of serious doubt. The argument, however, does not seem conclusive. A man in Bedlam, or in the French Convention, might be writing such stuff — stuff altogether of a piece with this, and that not only with perfect fluency, but with perfect consistency of character between the composition and the situation that gave birth to it. From a man's being known to write such stuff, it follows, therefore, not that a man is not living, but that he is living either in Bedlam, or in the French Convention.

A man turned crazy by self-conceit, takes a word in universal use, and determines within himself that he will use it in such a sense as a man never used it in before. With a word thus poisoned, he makes up a proposition, — any one that comes uppermost; and this he calls ingenuity: — this proposition he endeavours to cram down the throats of all those over whom he has or conceives himself to have power or influence — more especially of all legislators — of the legislators of the present and all future times; — and this he calls *liberty;* and this he call *government.*

"*The object of a political society can be no other than the greatest good of all.*"

This article announces a matter of fact in the form of an universal proposition, which, so far from being universally true, is not, nor perhaps ever was true in any instance.

It exhibits the same silly and unnecessary substitution of *can not* for *ought not* — the same use of an improper word for a proper one at least equally obvious — of an ambiguous for an unambiguous — unless to the original import of the word *can*, be here meant to be added, or rather substituted, its *mischief-making*, and *anarchy-exciting* import, — and that in consequence every society in which, on any point, any notion or notions of the public good were entertained different from those of Citizen Sieyes, shall on every such occasion be regarded as *ipso facto* in a state of dissolution.

One thing may be learned from the order given to the two articles—that happiness in society is an article but of secondary account. A matter of superior importance is—that the society should have been got together upon the never-exemplified and physically-impossible plan of an *original* and *universal* contract.

"*Every man is sole proprietor of his own person, and this property is inalienable.*"

More nonsense — more mischievous nonsense, — tendencies of the most mischievous kind, wrapped up under the cover of a silly epigram: as if a man were one thing, the person of the same man another thing; as if a man kept his person, when he happened to have one, as he does his watch, in one of his pockets. While the sentence means nothing, it is as true as other nonsense: give it a meaning, any meaning whatsoever that the words are capable of bearing, according to any import ever given to them, and it is false. If by the *property* in question, it is meant to include all the *uses* that can be made of the proprietary subject, the proposition is not self-contradictory and nonsensical: it is only a nugatory proposition of the *identical* kind.

If each individual be the only individual that is to be allowed to make any use whatsoever of the faculties of all kinds, active and passive, mental and corporal, of that individual, and this be meant by being *the proprietor of the person* of an individual, then true it is, that the person of each individual can have but one proprietor: — but if the case be, in any instance, that while the individual himself, and he alone, is permitted to make use to certain purposes of the faculties of that individual for a certain time, some other—any other — is permitted to make use of the faculties of the same individual to other purposes for the same time, then the proposition, that no individual can have a property in the person of another individual, is false: — the proposition that no man shall be suffered to have any property in the person of another, would be a mischievous one, and mischievous to a degree of madness.

In what manner is the legal relation of the husband to the wife constituted, but by giving him a right for a certain time, to the use of certain faculties of her's — by giving him, in so far, a property in her person?—and so with respect to the legal relations of the father to the child under age, and of the master to the apprentice or other servant, whatever be the nature of the service.

The present tense *is*, is absurdly put for the future *shall be*. Injustice, and of the most cruel kind, lurks under this absurdity. The effect of the future would only be to cut up domestic power, and thence domestic society, for the future: the effect of the present is to cut it up at the *instant*, and, by necessary inference, as to the *past*, and to put every past exercise of such power upon the footing of a crime; in a word, to have the retroactive effect disclaimed by the constitution of 1795. If no individual have at this present time any property, however limited, in the person of any other individual, it must be in virtue of some cause which has prevented his ever having had any such property in any past period of time: it must be, in a word, in virtue of some such cause as this, viz. its being contrary to the eternal, as well as inalienable and natural rights of man to possess any such property. If it be a crime in a man *now* to send his servant on an errand with a bundle on his back — to dip his ailing infant in a cold bath—or to exercise the rights supposed to be given him by marriage on his wife — it must have always been a crime, and a crime of equal dye, punishable at the mercy of such judges as Citizen Sieyes.

To make the matter worse — the mischief greater—the absurdity more profound, — this property, such as it is, whatever it be — all the property that any individual has in his own person — is to be considered as *inalienable*. No individual is to be suffered to give any other individual a right to make use of his person, his faculties, his services, in any shape. No man shall let himself out to service — no man shall put himself or his son out to serve as an apprentice — no man shall appoint a guardian to his child — no woman shall engage herself to a man in marriage.

Will it be said, that there is no such thing as *alienation for a time?* Or will it be said, in justification of the citizen, that the citizen did not know what he was talking about, and that though he spoke of alienation in general, alienation for all manner of terms, the only sort of alienation he really meant to interdict, in respect of the property in question, was alienation *during life?* and that the meaning of the citizen was not absolutely to forbid marriage — that he meant to allow of marriage for limited terms of years, and meant only to prohibit marriage for life?

But supposing even this to have been the purpose, and that purpose ever so good a one, the provision is still a futile one, and inadequate to that purpose. To what purpose forbid an alienation for *life*, if you admit of it for *years*, without restricting it to such a number of years as shall ensure it against possessing a duration co-extensive with at least the longest *ordinary* term of life? No such limitation has the citizen vouchsafed to give: — possibly as not finding it altogether easy to put any such limitation in years and figures into the mouth of *Queen Nature*, whose prime minister Citizen Sieyes, like so many other citizens, has been pleased to make himself.

The article seems to be levelled at negro

slavery; but I do not see what purpose it is capable of answering in that view. Does it mean to announce what *has been* the state of the law hitherto, or what *shall be* the state of the law in future? In the first case, its truth is questionable, and, true or false, it is of no use. In the latter sense, does it mean to declare, that no person shall have the right of exacting personal service of any other, or producing physical impressions on his passive faculties, without his consent? It reprobates all rights to services of any kind, and all powers of punishment. Does it declare that no such powers shall exist without limitation?—It does not so much as provide against negro slavery, even where the conditions on which it is established are most indefensible; for nowhere has the power of the master over the slave subsisted without limitations.

Does this article mean to set at perfect liberty all negro slaves at once? This would be not more irreconcilable with every idea of justice with regard to the interest of the present master, than with every idea of prudence with regard to the interest of the slaves themselves.

"*Every author may publish, or cause his productions to be published, and he may cause them to circulate freely, as well by the post as by any other way, without having ever to fear any abuse of confidence.*"

I shall make no observations upon the dangers arising from this unlimited liberty; but I cannot refrain from pointing out the silliness of the expression. The author intended to have said, that every abuse of confidence ought to be treated as an offence: but what he has said is, that the offence is impossible, so impossible that there is no reason to fear it; as if this declaration would be sufficient to deprive government and individuals of the power to commit an abuse of confidence.

"*Letters, in particular, ought to be considered as sacred by all the intermediate persons who may be found between the person who writes, and him to whom they are written.*"

What does this word *sacred* mean? Is this the manner in which a legislator ought to speak?

What! if a calumny — a plan of conspiracy — a project of assassination — be put into a letter, is that letter to be sacred? Will the opening it be *sacrilege?* This crime, if it be one, will be ranked in that class of crimes which have commonly been considered the most enormous offences against religion — offences against God himself.

Whilst as to the act itself, is it for the public good that government should open the letters? That is the question. If the law prohibit it, the post would become a terrible engine in the hands of malefactors and conspirators. With the intention of protecting the communications of individuals, this law would expose the public to the greatest dangers. There are some crimes so mischievous, that no means ought to be neglected for their prevention or detection. Will it be said, that the fear of having their letters opened will restrain honest correspondents in the communications of commerce, or the effusions of friendship?

It is true, that if the simple communication of opinions between individuals should be constituted a crime, the opening of letters might become a terrible engine of tyranny. But it is here that the precautions against abuse should be placed. It is this which is done in England, where the secretary of state may open letters upon his responsibility, though it be not allowed to any one else.

"*Every man is equally at liberty to go or stay, to enter or to go out, and even to leave the kingdom and to return into it, as shall seem good to him.*"

This article has reference not to the citizen alone, but to every man, to every stranger, as well as every Frenchman. All are at liberty to go or stay, to enter or to go out, to leave the kingdom or to return into it, as shall seem good to them. Absurdity cannot go farther. Is there to be no police? Cannot intercourse be interdicted — may not public edifices be closed — may not access to fortifications be prevented, &c.? With this unlimited right, how would it be possible to advise the construction of prisons for the detention of malefactors? How could the author of this declaration tolerate the laws against emigrants? Were not these laws a formal denial of the rights of man?

I do not impute these extravagant intentions to the author of the article: he had concluded the preceding article by the words — "*The law alone can mark the limits which ought to be given to this liberty as well as every other;*" and I suppose that the words *in the same manner*, at the head of this, announce that the liberty of going and coming is subject to the same restriction. But then the proposition which seems to say much, would have said nothing—"You may do everything except what the laws prohibit." Dangerous or insignificant, such is the alternative which is without ceasing found in this declaration.

"*In short, every man is at liberty to dispose of his wealth, of his property, and to regulate his expense as he thinks proper.*"

Here there is no legal restriction: the proposition is unlimited. If by *disposing of his wealth*, the author intend that he may do whatever he likes, the proposition is absurd in the extreme. Are there no necessary limits to the employment of his property? Ought a man to have the right of establishing after his death, either religious or anti-religious foundations at the expense of his family?

Ought not the law to hinder an individual from disinheriting his children without cause assigned?

"*To regulate his expense as he thinks proper,*" is a good housekeeping expression. A master may speak in this manner to his steward; but is this the style of a legislator? Minors, madmen, prodigals, ought to be placed under positive restrictions as to their expenses. There are cases in which certain sumptuary laws may be suitable. There may be good reasons for prohibiting games of hazard, lotteries, public entertainments, donations after the manner of the Romans, and a thousand other species of expense.

"*The law has for its object the common interest; it cannot grant any privilege to any one.*"

The first proposition is false in fact. The law *ought* only to have for its object the common interest: this is what is true. This error perpetually recurs in this little work.

But is the consequence which is drawn from this principle just? May there not be some privileges founded upon the common interest?

In one sense, all powers are privileges; in another sense, all social distinctions are so also. A title of honour, an honorary decoration, an order of knighthood — these are all privileges. Ought the legislature to be interdicted from the employment of these means of remuneration?

There is one species of privilege certainly very advantageous: the patents which are granted in England for a limited time, for inventions in arts and manufactures. Of all the methods of exciting and rewarding industry, this is the least burthensome, and the most exactly proportioned to the merit of the invention. This privilege has nothing in common with monopolies, which are so justly decried.

"*And if privileges are established, they ought to be instantly abolished, whatever may be their origin.*"

Here is the most unjust, the most tyrannical, the most odious principle. *Instantly abolished!* This is the order of the despot, who will listen to nothing, who will make everything bend to his will, who sacrifices everything to his caprice.

There are some privileges and rights which have been purchased at great price. Their sudden abolition would throw a great number of families into despair: it would strip them of their property — it would produce the same wrong to them as if a multitude of strangers were admitted to share their revenues, and that instantly.

There are some magisterial offices held by hereditary title. The possessors would be deprived of them without regard to their circumstances, to their welfare, or even to the interests of the state itself — and that instantly.

There are some commercial societies to which the law has granted monopolies. These monopolies are abolished, without regard to the ruin of the associates, to the advances they have made, to the engagements they have formed — and that instantly.

One great merit in a good administration is, that it proceeds gently in the reform of abuses — that it does not sacrifice existing interests — that it provides for the enjoyments of individuals — that it gradually prepares for good institutions — that it avoids all violent changes in condition, establishment, and fortune.

Instantly, is a term suitable to the meridians of Algiers and Constantinople. Gradually, is the language of justice and prudence.

"*If men are not equal in means,—that is to say, in wealth, in mind, in strength, &c. — it does not follow that they ought not all to be equal in rights.*"

Certainly the wife is not equal in rights to her husband; neither is the child under age equal to his father, nor the apprentice to his master, nor the soldier to his officer, nor the prisoner to the jailer, unless *the duty of obedience* should be exactly equal to the right of commanding. Difference in rights is precisely that which constitutes social subordination. Establish equal rights for all, there will be no more obedience, there will be no more society.

He who possesses property possesses rights — exercises rights — which the non-proprietor does not possess and does not exercise.

If all men are equal in rights, there will not exist any rights; for if all have the same right to a thing, there will no longer be any right for any one.

"*Every citizen who is unable to provide for his own wants, has a right to the assistance of his fellow-citizens.*"

To have a right to the assistance of his fellow-citizens, is to have a right to their assistance in their individual or their collective capacity.

To give to every poor person a right to the assistance of every individual who is not equally poor, is to overturn every idea of property; for as soon as I am unable to provide for my subsistence, I have right to be supported by you: I have a right to what you possess — it is my property as well as yours; the portion which is necessary to me is no longer yours — it is mine; you rob me if you keep it from me.

It is true that there are difficulties in its execution. I am poor: to which of my fellow-citizens ought I to address myself, to make him give me what I want? Is it to Peter rather than to Paul? If you confine yourself to declaring a general right, without

specifying how it is to be executed, you do nothing at all: I may die of hunger before I can find out who ought to supply me with food.

What the author has said, is not what he meant to say: his intention was to declare that the poor should have a right to the assistance of the community. But then it is necessary to determine how this assistance ought to be levied and distributed: it is necessary to organize the administration which ought to assist the poor — to create the officers who ought to inquire into their necessities, and to regulate the manner in which the poor ought to proceed in availing themselves of their right.

The relief of indigence is one of the noblest branches of civilization. In a state of nature, when we can form any idea of it, those who cannot procure food, die of hunger. There must exist a superfluity for a numerous class of the society, before it is possible to apply a part of it to the maintenance of the poor. But it is possible to suppose such a state of poverty — such a famine — that it would no longer be possible to supply bread to all who want it. How, then, can we convert this duty of benevolence into an absolute right? This would be to give the indigent class the most false and dangerous ideas: it would not only destroy all gratitude on the part of the poor towards their benefactors — it would put arms in their hands against all proprietors.

I am aware that the author would defend himself against all the consequences which so clearly spring from his principles, by the clause which he has inserted, "*That no one has the right to injure another*," and that the law may put bounds to the exercise of all the branches of liberty. But this clause reduces all his rights to nothing; for if the law may put bounds to them, till these are known, what knowledge can I have of my rights? — what use can I make of them? Nothing can be more fallacious than a declaration which gives me with one hand, what it authorizes the taking from me with the other. Thus cut down, this declaration might be propounded at Morocco or Algiers, and do neither good nor harm.

PRINCIPLES

OF

INTERNATIONAL LAW.

BY

JEREMY BENTHAM.

(NOW FIRST PUBLISHED FROM THE ORIGINAL MANUSCRIPTS.)

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* The original MSS. from which these Essays are edited, consist of *Projet Matiere*, *Marginata*, and fragments. By the first of these terms, Bentham designated the contents of paragraphs he intended to write; by the second, the contents of paragraphs he had written: — by means of these two sets of papers, the fragments have been arranged, and the connexion between them supplied; — but on this, as on every other occasion, the object of the Editor has been, without addition of his own, to show what Bentham has said upon each subject. This will account for the incompleteness of the Essays, and for the circumstance, that upon some points there are only indications of the subjects which Bentham had intended to discuss.

The MSS. here edited bear date 1786 to 1789.

PRINCIPLES OF INTERNATIONAL LAW.

ESSAY I.

OBJECTS OF INTERNATIONAL LAW.

If a citizen of the world had to prepare an universal international code, what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty. Would or would not the duty of a particular legislator, acting for one particular nation, be the same with that of the citizen of the world? That moderation, which would be a virtue in an individual acting for his own interests, would it become a vice, or treason, in a public man commissioned by a whole nation? Would it be sufficient for him to pursue in a strict or generous manner their interests as he would pursue his own? — or would it be proper, that he should pursue their interests as he would pursue his own, or ought he so to regulate his course in this respect as they would regulate theirs, were it possible for them to act with a full knowledge of all circumstances? And in this latter case, would the course he would pursue be unjust or equitable? What ought to be required of him in this respect?

Whatever he may think upon these questions — how small soever may be the regard which it may be wished that he should have for the common utility, it will not be the less necessary for him to understand it. This will be necessary for him on two accounts: In the first place, that he may follow this object in so far as his particular object is comprised in it; — secondly, that he may frame according to it, the expectations that he ought to entertain, the demands he ought to make upon other nations. For, in conclusion, the line of common utility once drawn, this would be the direction towards which the conduct of all nations would tend — in which their common efforts would find least resistance — in which they would operate with the greatest force — and in which the equilibrium once established, would be maintained with the least difficulty.

Let us take, for example, the famous law with respect to prizes, adopted by so many nations at the suggestion of Catherine II. of Russia. How formidable soever may have been the initiating power, there is no reason to think that it was fear which operated upon so many nations, together so powerful, and some of them so remote: it must have been its equity, that is to say, its common utility, or, what amounts to the same thing, its apparent utility, which determined their acceptance of it. I say real or apparent; for it will be seen that this is not the place to decide without necessity upon a question so delicate and complex.

But ought the sovereign of a state to sacrifice the interests of his subjects for the advantage of foreigners? Why not? — provided it be in a case, if there be such an one, in which it would have been praiseworthy in his subjects to make the sacrifice themselves.

Probity itself, so praiseworthy in an individual, why should it not be so in a whole nation? Praiseworthy in each one, how can it be otherwise in all? It may have been true that Charles the Second did well in selling Dunkirk: he would not have done less well, had he not put the price in his own pocket.

It is the end which determines the means. Here the end changes (or at least appears to change;) it is therefore necessary that the means should change or appear to change also.

The end of the conduct which a sovereign ought to observe relative to his own subjects, — the end of the internal laws of a society, — ought to be the greatest happiness of the society concerned. This is the end which individuals will unite in approving, if they approve of any. It is the straight line — the shortest line — the most natural of all those by which it is possible for a sovereign to direct his course. The end of the conduct he ought to observe towards other men, what ought it to be, judging by the same principle? Shall it again be said, the greatest happiness of his own subjects? Upon this footing, the welfare, the demands of other men, will be as nothing in his eyes: with regard to them, he will have no other object than that of subjecting them to his wishes by all manner of means. He will serve them as he actually serves the beasts, which are used by him as they use the herbs on which they browse — in short, as the ancient Greeks, as the Romans, as all the models of virtue in antiquity, as all the nations with whose history we are acquainted, employed them.

Yet in proceeding in this career, he cannot fail always to experience a certain resistance — resistance similar in its nature and in its cause, if not always in its certainty and efficacy, to that which individuals ought from the first to experience in a more restricted career; so that, from reiterated experience, states ought either to have set themselves to seek out — or at least would have found, their line of least resistance, as individuals of that same society have already found theirs; and this will be the line which represents the greatest and common utility of all nations taken together.

The point of repose will be that in which all the forces find their equilibrium, from which the greatest difficulty would be found in making them to depart.

Hence, in order to regulate his proceedings with regard to other nations, a given sovereign has no other means more adapted to attain his own particular end, than the setting before his eyes the general end — the most extended welfare of all the nations on the earth. So that it happens that this most vast and extended end — this foreign end — will appear, so to speak, to govern and to carry with it the principal, the ultimate end; in such manner, that in order to attain to this, there is no method more sure for a sovereign than so to act, as if he had no other object than to attain to the other; — in the same manner as in its approach to the sun, a satellite has no other course to pursue than that which is taken by the planet which governs it.

For greater simplicity, let us therefore substitute everywhere this object to the other: — and though unhappily there has not yet been any body of law which regulates the conduct of a given nation, in respect to all other nations on every occasion, as if this had been, or say rather, as if this ought to be, the rule, — yet let *us* do as much as is possible to establish one.

1. The first object of international law for a given nation: — Utility general, in so far as it consists in doing no injury to the other nations respectively, saving the regard which is proper to its own well-being.

2. Second object: — Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being.

3. Third object: — Utility general, in so far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations.

4. Fourth object: — Utility general, in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations.

It is to the two former objects that the duties which the given nation ought to recognise may be referred. It is to the two latter that the rights which it ought to claim may be referred. But if these same rights shall in its opinion be violated, in what manner, by what means shall it apply, or seek for satisfaction? There is no other mode but that of war. But war is an evil — it is even the complication of all other evils.

5. Fifth object: — In case of war, make such arrangements, that the least possible evil may be produced, consistent with the acquisitior of the good which is sought for.

Expressed in the most general manner, the end that a disinterested legislator upon international law would propose to himself, would therefore be the greatest happiness of all nations taken together.

In resolving this into the most primitive principles, he would follow the same route which he would follow with regard to internal laws. He would set himself to prevent positive international offences — to encourage the practice of positively useful actions.

He would regard as a positive crime every proceeding — every arrangement, by which the given nation should do more evil to foreign nations taken together, whose interests might be affected, than it should do good to itself. For example, the seizing a port which would be of no use except as the means of advantageously attacking a foreign nation; — the closing against other nations, or another nation, the seas and rivers, which are the highways of our globe; — the employing force or fraud for preventing a foreign nation from carrying on commerce with another nation. But by their reciprocity, injuries may compensate one another.

In the same manner, he would regard as a negative offence every determination, by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than it would produce evil to itself. For example, if the given nation, without having reason to fear for its own preservation (occupying two countries of which the productions were different,) should obstinately prohibit commerce with them and a foreign nation: — or if when a foreign nation should be visited with misfortune, and require assistance, it should neglect to furnish it: — or, in conclusion, if having in its own power certain malefactors who have *malâ fide* committed crimes to the prejudice of the foreign nation, it should neglect to do what depends upon it to bring them to justice.

War is, as has been said, a species of procedure by which one nation endeavours to enforce its rights at the expense of another nation. It is the only method to which recourse can be had, when no other method of

obtaining satisfaction can be found by complainants, who have no arbitrator between them sufficiently strong, absolutely to take from them all hope of resistance. But if internal procedure be attended by painful ills, international procedure is attended by ills infinitely more painful — in certain respects in point of intensity, commonly in point of duration, and always in point of extent. The counterpart of them will, however, be found in the catalogue of offences against justice.

The laws of peace would therefore be the substantive laws of the international code: the laws of war would be the adjective laws of the same code.

The thread of analogy is now spun; it will be easy to follow it. There are, however, certain differences.

A nation has its property — its honour — and even its condition. It may be attacked in all these particulars, without the individuals who compose it being affected. Will it be said that it has its person? Let us guard against the employment of figures in matter of jurisprudence. Lawyers will borrow them, and turn them into fictions, amidst which all light and common sense will disappear; then mists will rise, amidst the darkness of which they will reap a harvest of false and pernicious consequences.

Among nations, there is no punishment. In general, there is nothing but restitution, to the effect of causing the evil to cease; — rarely, indemnification for the past; because among them there can scarcely be any *mauvaise foi*. There is but too much of it too often among their chiefs; so that there would be no great evil if, at the close of his career, every conqueror were to end his days upon the rack — if the justice which Thomyris executed upon Cyrus were not deemed more striking, and his head were not thrown into a vessel of blood, — without doubting that the head of Cyrus was most properly thrown there. But however dishonest the intention of their chiefs may be, the subjects are always honest. The nation once bound — and it is the chief which binds it — however criminal the aggression may be, there is properly no other criminal than the chief: — individuals are only his innocent and unfortunate instruments. The extenuation which is drawn from the weight of authority, rises here to the level of an entire exemption.

The suffrages of the principle of antipathy are here found in accord with the principle of utility: on the one part, vengeance wants a suitable object; on the other hand, every punishment would be unnecessary, useless, expensive, and inefficacious.

As to the third and fourth objects, it is scarcely necessary to insist on them: — nations, as well as men, sovereigns as well as individuals, pay sufficient attention to their own interests — there is scarcely any need to seek to lead them to it. There remain the two first and the last.

To actions by which the conduct of an individual tends to swerve from the end which internal laws ought to propose to themselves, I have given, by way of anticipation, the name of offences:—by a similar anticipation, we may apply the same appellation to actions by which the conduct of a whole nation swerves from the object which international laws ought to propose to themselves.

Among sovereigns, as well as among individuals, there are some offences *de bonne foi;* there are others *de mauvaise foi*. One must be blind to deny the latter — one must be much more sadly blind to deny the others. People sometimes think to prove their discernment by referring everything to the latter head, or to prove it equally by referring everything to the former. It is in this manner they proceed in judging of men, and especially of sovereigns: they grant to them an intelligence without limits, rather than recognise in them a grain of probity; they are believed never to have blushed at folly, provided that it has had malignity for its companion. So much has been said of the injustice of sovereigns, that I could wish a little consideration were given to the still more common injustice of their detractors; who, whilst they preserve their concealment, revenge themselves upon the species in general, for the adulation which in public they lavish upon individuals.

The following are among the causes of offences *de bonne foi*, and of wars:—

1. Uncertainty of the right of succession with regard to vacant thrones claimed by two parties.

2. Intestine troubles in neighbouring states. These troubles may also have for their cause an uncertainty of the same kind as the preceding, or a dispute concerning constitutional law in the neighbouring state, either between the sovereign and his subjects, or between different members of the sovereign body.

3. Uncertainty with respect to limits, whether actual or ideal. The object of these limits may be to keep separate either goods, or persons, or causes.

4. Uncertainty as to the limits of new discoveries made by one party or another.*

* In modern times, one of the most fruitful sources of war has been the limits of new discoveries. They have sometimes been traced by common agreement: — but this has seldom happened till after wars or discontents which have sown the seeds of wars. It would be better to undertake such labours in cool blood, and to make previous arrangements with regard to possible discoveries, without waiting till they are made. It was thus that a pope once thought, with a mathematical line, to have for ever crushed the seeds of future wars. This was not ill-imagined at a time when the earth was flat, and the

5. Jealousies caused by forced cessions, more or less recent.

6. Disputes or wars, from whatsoever cause they may arise, among circumjacent states.

7. Religious hatred.

Means of Prevention.

1. Homologation of unwritten laws which are considered as established by custom.

2. New conventions — new international laws to be made upon all points which remain unascertained; that is to say, upon the greater number of points in which the interests of two states are capable of collision.

3. Perfecting the style of the laws of all kinds, whether internal or international. How many wars have there been, which have had for their principal, or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician!

ESSAY II.

OF SUBJECTS, OR OF THE PERSONAL EXTENT OF THE DOMINION OF THE LAWS.

Coextensive to dominion is jurisdiction: dominion the right of the sovereign; jurisdiction of the judge. Not that it is necessary that there should be any one judge or set of judges whose jurisdiction should be coextensive with the dominion of the sovereign — only that for every particle of dominion there should be a correspondent particle of jurisdiction in the hands of some judge or other: correspondent to one field of dominion there may be many fields of jurisdiction.

What is dominion? It is either the power of contrectation, or else that of imperation, for there are no others. But the power of contrectation is a sort of power which, in a settled government, it scarcely ever becomes either necessary or agreeable to the sovereign, as such, to exercise; so that under the head of the power of imperation is comprised all the power which the sovereign is accustomed to exercise: and the same observation may be applied to the power of the judge.

Of the power of imperation, or the power of issuing mandates, the amplitude will be as the amplitude of the mandates which may be issued in virtue of it: the amplitude and quality of the mandates will be as the amplitude and quality of the persons who are their *agible* subjects — the persons who are their *passible* subjects — the things, if any, which are their *passible* subjects, and the acts which are their *objects* in place and time.

The persons who are their *agible* subjects are the persons whose acts are in question — the persons whose acts are the objects of the mandate.

A sovereign is styled such, in the first instance, in respect of the persons whom he has the right or power to command. Now, the right or legal power to command may be coextensive with the physical power of giving force and effect to the command; that is, by the physical power of hurting — the power of hyper-physical contrectation employed for the purpose of hurting. But by possibility, every sovereign may have the power of hurting any or every person whatsoever, and that not at different times only, but even at one and the same time.

According to this criterion, then, the sphere of possible jurisdiction is to every person the same; but the problem is to determine what persons ought to be considered as being under the dominion of one sovereign, and what others under the dominion of another; — in other words, what persons ought to be considered as the subjects of one sovereign, and what as the subjects of another.

The object of the present essay is to determine, upon the principle of utility, what persons ought, in the several cases that may present themselves, to be considered as the subjects of the law of the political state in question, as subject to the contrectative or imperative power of that law.

Proceeding as usual upon the exhaustive plan, I shall examine —

1. Over what persons the law can in point of possibility exercise dominion; what persons in point of possibility may be the subject of it; what persons in point of possibility it may treat as upon the footing of its subjects with effect; over what persons the law has possible dominion and jurisdiction; over what persons the law may have dominion and jurisdiction in point of force.

2. Over other persons than these, it is plain that it can never be right to say, the law *ought* upon the principle of utility to ex-

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servant of servants was the ruler of kings. Since that time the earth has become round, and the power of the triple crown is somewhat retrenched. Still, however, that demarcation is not the less good as a lesson, how defective soever it may be as a law. The difficulty would be to trace such limits as should agree with objects which have not been seen. An island, for example: in what case ought the whole of it to belong to those who first discovered it, and when to many others who have equally touched at it? Ought it to belong to him who first saw it without entering it, — to him who first entered it, — or to him who first went round it? How also shall an island in every case be distinguished from a part of a continent, or even from an entire continent, which may be very extensive? And when it respects a discovered continent, to what distance shall the right of posession extend? Shall it be the space inclosed by the sea, the two nearest navigable rivers, and the high ground in which these rivers take their rise? What depth shall constitute a navigable river? &c. In these points may be seen a crowd of questions sufficiently difficult of resolution.

ercise jurisdiction. Why? Because it is idle to say of the lawgiver, as of anybody else, that he ought to do that which by the supposition is impossible.

The next inquiry is, then, — the persons over whom the law may in point of possibility exercise dominion being given, over what sort of persons in that number ought the law in point of utility to exercise dominion? what persons of that number ought to be looked upon as subject to it? over what persons of that number it has jurisdiction in point of *right?* taking general utility as the measure of right, as usual, where positive law is out of the question.

3. It will then be another, and that a distinct question, over what sort of persons, and in what cases, the law in any given state does actually exercise dominion? and over what sort of persons, and in what cases, the law has dominion in point of exercise?

Dominion, then, may be distinguished into — 1. Dominion potential, or in point of force; 2. Dominion actual, or dominion in point of exercise; 3. Jurisdiction rightful or rather approveable, or jurisdiction in point of moral right.

The nature of the present design is to determine in what cases, if actual dominion were established, it would be *rightful:* in other words, in what cases it is the moral right, and at the same time the moral duty, — in what cases the moral right, without being the moral duty, — of the given sovereign, as towards other sovereigns, to cause jurisdiction to be exercised over persons who are subject to his physical power? How far, and in what points, sovereigns, in the jurisdiction which they cause to be exercised over such persons as are within their reach, ought to yield or be aiding to each other?

An individual can be subject to a sovereign no farther than the physical power which that sovereign has of hurting him, or his *afflictive* power, as it may be called, extends. The question is, the cases in which the sovereign has the power of hurting him being given, in which of them ought he, upon the principle of utility, to exercise that power? — in which of them ought other sovereigns, who may think their power concerned, to acquiesce in his exercising such power?

In every state, there are certain persons who are in all events, throughout their lives, and in all places, subject to the sovereign of that state — it is out of the obedience of these that the essence of sovereignty is constituted: these may be styled the *standing or ordinary subjects* of the sovereign or the state; and the dominion over them may be styled fixed or regular. There are others who are subject to him only in certain events, for a certain time, while they are at a certain place: the obedience of these constitutes only an accidental appendage to his sovereignty: these may be termed his *occasional* or *extraordinary* subjects, or *subjects pro re nata;* and the dominion he has over them may be styled *occasional.**

His afflictive power being the limit of his actual as well as of his rightful dominion, his standing subjects will be those over whom he has the most afflictive power — over whom his afflictive power is the strongest: over his occasional subjects, his afflictive power will not be so strong. Now the points in which a man can be hurt are all of them comprised, as we have seen, under these four, viz. his person, his reputation, his property, and his condition. Of these four points, that in respect of which he can be made to suffer most is his person: since that includes not only his liberty, but his life. The highest jurisdiction therefore, is that of which the subject is a man's person. According to this criterion, then, the standing subjects of a sovereign should be those individuals whose persons are in his power.

This criterion would be a perfectly clear and eligible one, were the case such, that in the ordinary tenor of human affairs, the persons of the same individuals were constantly under the physical power, or, as we say, within the *reach* of the same sovereign. But this is not the case. The different interests and concerns of the subject, the interest even of the sovereign himself, requires the subject to transport himself necessarily to various places, where, according to the above criterion, he would respectively become the subject of so many sovereigns. But the question is, to what sovereign a given individual is subject, in a sense in which he is not subject to any other? This question, it is plain, can never be determined by a criterion which determines him to be the subject of one sovereign, in the same sense in which he may be subject to any number of other sovereigns. According to this criterion, a sovereign might have millions of subjects one day, and none at all the next.

Some circumstance, therefore, more constant and less precarious, must be found to ground a claim of standing dominion upon, than that of the present facility of exercising an afflictive power over the person of the supposed subject: a facility which, in truth, is no more than might be possessed not only by an established sovereign, but by any, the most insignificant oppressor. Any man may, at times, have the power of hurting any other man. The circumstance of territorial dominion — dominion over land — possesses the properties desired. It can seldom happen that two sovereigns can, each of them, with equal

* Country allegiance, sovereignty and subjection, may therefore be either fixed and regular, or occasional.

facility, the other being unwilling, traverse the same tract of land. That sovereign then who has the physical power of occupying and traversing a given tract of land, insomuch that he can effectually and safely traverse it in any direction at pleasure, — at the same time, that against his will another sovereign cannot traverse the same land with equal facility and effect, — can be more certain of *coming at* the individual in question, than such other sovereign can be, and therefore may be pronounced to have the afflictive power over all such persons as are to be found upon that land — and that a higher afflictive power than any other sovereign can have. And hence, the maxim dominion over person depends upon dominion over land.

But even this *indicium*, this mark, is not a ground of sufficient permanence whereon to found the definition of standing sovereignty: for the same individual who is one day on land, which is under the dominion of a given sovereign, may another day be on land which is not under his dominion: from this circumstance, therefore, no permanent relation can be derived. But, that the relation should be a permanent one, is requisite on various grounds, upon the principle of utility — that each subject may know what sovereign to resort to, principally for protection, — that each sovereign may know what subjects to depend upon for obedience, — and that each sovereign may know when to insist, and when to yield in any contest which he might have with any other sovereign, who might lay a claim to the obedience of the same subjects.

The circumstance, then, which is taken for the *indicium* of sovereignty on the one part, and subjection on the other, should be not a *situation*, which at any time may change, but an *event:* this event should be one which must have happened once — which cannot have happened more than once — and which, having happened once, cannot be in the condition of one which has not happened; in short, an event which is past, necessary, and unicurrent. Such an event is that found in the event of a man's *birth* — which must have happened for the man to exist — which cannot happen a second time, and which, being over, cannot but have happened — which must have happened in some district of the earth; so that at that period the man must have been within the physical power of the sovereign within whose territory he was born.

Yet still it is not birth that is the immediate ground of jurisdiction: the immediate ground is *presence* — presence with reference to the *locus* of the territorial dominion: if birth be the ground of dominion, it is only in virtue of the presumption which it affords of the other circumstance. In every state, almost, there are some who emigrate from the dominion within which they were born. But in every state almost, it is otherwise with by far the greater number. In civilized nations the greater part of mankind are *glebæ ascriptitii*, fixtures to the soil on which they are born. With nations of hunters and shepherds — with tribes of American savages, and hordes of Tartars or Arabians, it is otherwise. But with these we have no business here.

Thus it is that dominion over the soil confers dominion *de facto* over the greater part of the natives, its inhabitants; in such manner, that such inhabitants are treated as owing a permanent allegiance to the sovereign of that soil: and, in general, there seems no reason why it should not be deemed to do so, even *de jure*, judging upon the principle of utility. On the one hand, the sovereign, on his part, naturally expects to possess the obedience of persons who stand in this sort of relation to him: possessing it at first, he naturally expects to possess it — he is accustomed to reckon upon it: were he to cease to possess it, it might be a disappointment to him: any other sovereign having even begun to possess the allegiance of the same subject, has not the same cause for expecting to possess it; not entertaining any such expectation, the not possessing it is no disappointment: for subjects, in as far as their obedience is a matter of private benefit to the sovereign, may, without any real impropriety (*absit verbo invidia*,) be considered as subjects of his property. They may be considered as his property, just as any individual who owes another a service of any kind, may, *pro tanto*, be considered as his property. We speak of the service as being his property (such is the turn of the language,) that is, as being the object of his property; but a service being but a fictitious entity, can be but a fictitious object of property, — the real, and only real object, is the person from whom the service is due.

On the other hand, let us consider the state of mind and expectations of the subject. The subject having been accustomed from his birth to look upon the sovereign as his sovereign, continues all along to look upon him in the same light: to be obedient to him is as natural as to be obedient to his own father. He lives, and has all along been accustomed to live under his laws. He has some intimation (I wish the universal negligence of sovereigns, in the matter of promulgation, would permit me to say anything more than a very inaccurate and general intimation,) some intimation he has, however, of the nature of them. When occasion happens, he is accustomed to obey them. He finds it no hardship to obey them, none at least in comparison with what it would be were they altogether new to him; whereas, those of another sovereign, were they in themselves more easy, might, merely on account of their novelty, appear, and therefore be, harder upon the whole.

Thus much as to the more usual case where a man continues to inhabit, as his parents did before him, the country in which he was born. But what if his parents, being inhabitants of another country, were sojourners only, or mere travellers in the country in which he was born, and he, immediately after his birth, carried out of it never to see it again? The manners and customs, the religion, the way of thinking, the laws, of the one country opposite to those of the other? The sovereign of the one, at war with the sovereign of the other? If regard be paid to *birth*, something surely is due to *lineage*: an Englishwoman, travelling with her husband from Italy through France, is delivered of a son in France: — shall the son, when he grows up, be punished as a traitor, if taken in battle when fighting against the king of France? or, on the other hand, supposing it to be right and politic for the king of France to refuse to strangers born out of his dominion any of the rights enjoyed by his native subjects, would it be right that this man, who has never looked upon the French as his countrymen, nor the king of France as his sovereign, should partake of privileges which are denied to the subjects of the most favoured foreign nation? Shall the offspring of English protestants, born at Cadiz, be reclaimed as a fugitive from the inquisition? or the offspring of Spanish catholics, born in London, undergo the severity of the English laws, for being reconciled to the Church of Rome? Shall the Mahometan, born at Gibraltar, be punished for polygamy or wine drinking?

Nor would it, it should seem, be an adequate remedy to these inconveniences to take the birth-place of the parents, or, in case of their birth-places being different, that of the father, for example, as the *indicium*, to determine the allegiance of the child: the circumstances of their birth might have been accompanied by a similar irregularity. During a man's education, his parents may have lived half their time in one country, half in another; what external mark can there be to determine to which of the two countries, if to either, his affections are attached?

The best way, therefore, seems to be, to refer the solution of the question to those alone who are in a condition to give it: and to refer the option of his country, in the first instance, to the parents or guardian provisionally, while the child is incapable of judging for himself; afterwards to himself, as soon as he is judged capable; so that when he comes to a certain age he shall take his choice.

A man may, therefore, be a member of a community either permanently or occasionally.

*A man may be permanently a member of a community: — 1. By lineage, as the paternal grandson of an Englishman is an Englishman, wherever born; 2. By birth; 3 By naturalization.

A man may be occasionally the member of a community:—1. By fixed residence; 2. By travelling.

Jurisdiction may be distinguished into — 1. Potential; 2. Rightful; 3. Actual.

The first principle with regard to its exercise, is regard for the interest of one's own state.

This must however be controuled in point of volition and act, by the consideration of what will be endured by other states.

The next consideration is, in what cases jurisdiction may be assumed for the sake of foreign states.

Over the natives of a foreign state, jurisdiction may be exercised: — 1. For its own sake; 2. For the sake of the native's state; 3. For the sake of some other state; 4. For the sake of mankind at large.

For the same reasons, it may be exercised over its own subjects for offences committed in foreign states.

For its own sake it ought to punish all injurious offences committed for lucre, although committed abroad by foreigners.

The following considerations may restrain the state proposed from punishing offences committed out of its dominions: —

1. The difficulty of getting evidence, since foreigners cannot be compelled to appear.

Supposing the difficulty of procuring evidence to be got over, there is another difficulty, — the insuring the veracity of the evidence. If perjury should be detected, and even proofs obtained after the foreigner is gone back to his own country, he could not be punished.

This difficulty might be overcome by a commission to examine foreign witnesses abroad, touching any particular fact, application being made to the sovereign abroad for his sanction to corroborate the powers of the commissioners; or the commission might be given to his own subjects to execute, — it being left to the judgment of the judges in each case, whether the evidence alleged be the whole, or if not the whole, whether sufficient evidence.

Such a concurrence and communication is no more visionary and impracticable in all cases, than in admiralty causes concerning captures.

2. The fear of giving umbrage to foreign powers.

The former consideration applies equally to offences committed by citizens as by foreigners. The latter scarcely at all to offences committed by citizens, or at least not so strongly, as to offences committed by foreigners — citizens of the State by which it is feared umbrage may be taken.

* The following sentences are taken from Bentham's "*Projet Matiere.*"—*Ed.*

The following considerations may impel the State proposed, to punish offences committed out of its dominion: —

1. Regard for the interest of the citizens.

2. Regard for the interests of foreigners, — viz. the foreign state or individual injured by the offence.

ESSAY III.

OF WAR, CONSIDERED IN RESPECT OF ITS CAUSES AND CONSEQUENCES.

WAR is mischief upon the largest scale. It might seem at first sight, that to inquire into the causes of war would be the same thing as to inquire into the causes of criminality, and that in the one case as in the other, the source of it is to be looked for in the nature of man, — in the self-regarding, the dissocial, and now and then, in some measure, in the social affections. A nearer view, however, will show in several points considerable difference, — these differences turn on the magnitude of the scale. The same motives will certainly be found operating in the one case as in the other; but in tracing the process from the original cause to the ultimate effect, a variety of intermediate considerations will present themselves in the instance of war, which have no place in the quarrels of individuals.

Incentives to war will be found in the war-admiring turn of histories, particularly ancient histories, in the prejudices of men, the notion of natural rivalry and repugnancy of interests, confusion between *meum* and *tuum* — between private ownership and public sovereignty, and the notion of punishment, which, in case of war, can never be other than vicarious.

In ancient times there was one system of inducements, under the feudal system another, and in modern times another.

The following may be enumerated among the inducements to war: — Apprehension of injustice — hope of plunder of moveables by individuals — hope of gain by raising contributions — hope of gain by sale or ransom of captives — national pride or glory — monarchical pride — national antipathy — increase of patronage — hope of preferment.

States have no persons distinct from the persons of individuals; but they have property, which is the property of the state, and not of individuals.

When an individual has a dispute about property with an individual, or has sustained what he looks upon as an injury in respect of his property from an individual, he applies for redress to their common superior, the judicial power of the state. When a state has sustained what it looks upon as an injury, in respect of property, from another state — there being no common superior ready chosen for them — it must either submit to the injury, or get the other state to join in the appointment of a common judge, or go to war.

Every state regards itself as bound to afford to its own subjects protection, so far as it is in its power, against all injuries they may sustain either from the subjects or the government of any other state. The utility of the disposition to afford such protection is evident, and the existence of such disposition no less so. Accordingly, if any individual subject of the state A, receive from a subject of the state B, an injury for which the state B forbears, after due proof and demand, to afford or procure adequate satisfaction, it is to the purpose of responsibility, the same thing as if the state B itself, in the persons of the members of its government, had done the injury.

The following may be set down as the principal causes or occasions of war, with some of the means of prevention: —

I. Offences real or pretended of the citizens of one state, towards the citizens of another state, caused by the interests of the citizens —

1. Injuries in general. *Means of prevention:* — Liquidation of the pretensions of the subjects of every sovereign, with regard to the subjects of every other sovereign.

2. Occasional injuries from rivalry in commerce: interception of the rights of property. *Means of prevention:* — General liberty of commerce.

II. Offences, real or pretended, of the citizens of one state towards the citizens of another state, caused by the interests or pretensions of sovereigns: —

1. Disputes respecting the right of succession. *Means of prevention:* — Liquidation of titles: perfecting the style of the laws.

2. Disputes respecting boundaries, whether physical or ideal. *Means of prevention:* — Liquidation of titles: amicable demarcations positively made: perfecting of the style of the laws: regulation.

3. Disputes arising from violations of territory.

4. Enterprizes of conquest. *Means of prevention:* — Confederations of defence: alliances defensive: general guarantees.

5. Attempts at monopoly in commerce: Insolence of the strong towards the weak: tyranny of one nation towards another. *Means of prevention:* — Confederations defensive: conventions limiting the number of troops to be maintained.

No one could regard treaties implying positive obligations in this kind as chimerical; yet, if these are not so, those implying negative obligation are still less so. There may arise difficulty in maintaining an army; there can arise none in not doing so.

It must be allowed that the matter would be a delicate one: there might be some difficulty in persuading one lion to cut his claws; but if the lion, or rather the enormous condor which holds him fast by the head, should agree to cut his talons also, there would be no disgrace in the stipulation: the advantage or inconvenience would be reciprocal.

Let the cost of the attempt be what it would, it would be amply repaid by success. What tranquillity for all sovereigns! — what relief for every people! What a spring would not the commerce, the population, the wealth of all nations take, which are at present confined, when set free from the fetters in which they are now held by the care of their defence!

6. Fear of conquests. *Means of prevention:* — Defensive confederations.

7. Disputes respecting new discoveries — respecting the limits of acquisitions made by one state at the expense of another, on the ground of peaceful occupation. *Means of prevention:* — Previous agreement on the subject of possible discoveries.

8. Part taken in intestine troubles.

The refusal of a foreign power to recognise the right of a newly-formed government, has been a frequent cause of war; but no interest being at stake on either side, nothing so much as proposed to be gained, it is evident, that on both sides, whatever mischief is produced, is so much misery created in waste.

9. Injuries caused on account of religion. The difference between religion and no religion, however grating, is not nearly so irritating as that between one religion and another. *Means of prevention:* — Progress of toleration.

10. Interest of ministers. *Means of prevention:* — Salaries determinate, but effective.

Wars may be: —

I. *Bonâ fide* wars. A remedy against these would be found in "The Tribunal of Peace."*

II. Wars of passion. The remedy against these, — Reasoning, showing the repugnancy betwixt passion on the one hand, and justice as well as interest on the other.

III. Wars of ambition, or insolence, or rapine. The remedies against these are — 1. Reasoning, showing the repugnancy betwixt ambition and true interest; 2. Remedies of regulation, in the event of a temporary ascendency on the part of reason.

In all these cases, the utility with regard to the state which looks upon itself as aggrieved — the reasonableness in a word, of going to war with the aggressor — depends partly upon his relative force, partly upon what appears to have been the state of his mind with relation to the injury. If it be evident that there was no *mala fides* on his part, it can never be for the advantage of the aggrieved state to have recourse to war, whether it be stronger or weaker than the aggressor, and that in whatever degree; — in that case, be the injury what it will, it may be pronounced impossible that the value of it should ever amount to the expense of war, be it ever so short, and carried on upon ever so frugal a scale.

In case of *mala fides*, whether even then it would be worth while to have recourse to war, will depend upon circumstances. If it appear that the injury in question is but a prelude to others, and that it proceeds from a disposition which nothing less than entire destruction can satisfy, and war presents any tolerable chance of success, how small soever, prudence and reason may join with passion in prescribing war as the only remedy in so desperate a disease. For, though in case of perseverance on the part of the assailant, successful resistance may appear impossible; yet resistance, such as can be opposed, may, by gaining time, give room for some unexpected incident to arise, and may at any rate, by the inconvenience it occasions to the assailant, contribute in time or loss, to weaken the mass of inducements which prompt him to similar enterprises. Though the Spartans at Thermopylæ perished to a man, yet the defence of Thermopylæ was not without its use.

If, on the other hand, the aggression, though too flagrant not to be accompanied with *mala fides*, appear to have for its origin some passion or caprice which has for its incentive some limited object, and promises to be contented with that object, — the option is now, not between ruin avenged and unavenged, but between the loss of the object, whatever it be, and the miseries of a more or less hopeless war.

The Dutch displayed prudence, while they yielded to the suggestions of indignation, in defending themselves against the force of Spain. The same people displayed their prudence in yielding to Britain the frivolous honours of the flag, at the end of the war of 1652; they would have displayed still more, if they had made the same concession at the beginning of it.

Lastly, if the aggression, how unjust soever it may appear, when viewed in the point of view in which it is contemplated by the state which is the object of it, does not appear accompanied with *mala fides* on the part of the aggressor, nothing can be more incontestable than the prudence of submitting to it, rather than encountering the calamities of war. The sacrifice is seen at once in its utmost extent, and it must be singular indeed, if the amount of it can approach to that of the expense of a single campaign.

When war has broken out, a palliative for its evils might perhaps be found in the appointment of war-residents, to provide for prisoners and to prevent violations of the laws of war

Will it be said, that in quality of a spy such

* See *Essay* IV. p. 546.

residents would be to be feared? An enemy known to be such, could scarcely be a spy. All the proceedings of such residents should be open, and all his letters subjected to inspection.

At present, foreigners are scarcely excluded from an enemy's country — scarcely even military men or ministers; and so soon as it is wished to employ a spy, could not a native be found?

A resident of this character could always be employed as a channel of communication, if an accommodation were desired.

ESSAY IV.

A PLAN FOR AN UNIVERSAL AND PERPETUAL PEACE.

THE object of the present Essay is to submit to the world a plan for an universal and perpetual peace. The globe is the field of dominion to which the author aspires, — the press the engine, and the only one he employs, — the cabinet of mankind the theatre of his intrigue.

The happiest of mankind are sufferers by war; and the wisest, nay, even the least wise, are wise enough to ascribe the chief of their sufferings to that cause.

The following plan has for its basis two fundamental propositions:—1. The reduction and fixation of the force of the several nations that compose the European system; 2. The emancipation of the distant dependencies of each state.* Each of these propositions has its distinct advantages; but neither of them, it will appear, would completely answer the purpose without the other.

As to the utility of such an universal and lasting peace, supposing a plan for that purpose practicable, and likely to be adopted, there can be but one voice. The objection, and the only objection to it, is the apparent impracticability of it; — that it is not only hopeless, but that to such a degree that any proposal to that effect deserves the name of visionary and ridiculous. This objection I shall endeavour in the first place to remove; for the removal of this prejudice may be necessary to procure for the plan a hearing.

What can be better suited to the preparing of men's minds for the reception of such a proposal than the proposal itself?

Let it not be objected that the age is not ripe for such a proposal: the more it wants of being ripe, the sooner we should begin to do what can be done to ripen it; the more we should do to ripen it. A proposal of this sort, is one of those things that can never come too early nor too late.

Who that bears the name of Christian can refuse the assistance of his prayers? What pulpit can forbear to second me with its eloquence,—Catholics and Protestants, Church-of-England-men and Dissenters, may all agree in this, if in nothing else. I call upon them all to aid me with their countenance and their support.

The ensuing sheets are dedicated to the common welfare of all civilized nations; but more particularly of Great Britain and France.

The end in view is to recommend three grand objects, — simplicity of government, national frugality, and peace.

Reflection has satisfied me of the truth of the following propositions: —

I. That it is not the interest of Great Britain to have any foreign dependencies whatsoever.

II. That it is not the interest of Great Britain to have any treaty of alliance, offensive or defensive, with any other power whatever.

III. That it is not the interest of Great Britain to have any treaty with any power whatsoever, for the purpose of possessing any advantage whatsoever in point of trade, to the exclusion of any other nation whatsoever.

IV. That it is not the interest of Great Britain to keep up any naval force beyond what may be sufficient to defend its commerce against pirates.

V. That it is not the interest of Great Britain to keep on foot any regulations whatsoever of distant preparation for the augmentation or maintenance of its naval force; such as the Navigation Act, bounties on the Greenland trade, and other trades regarded as nurseries for seamen.

VI. VII. VIII. IX. & X. That all these several propositions are also true of France.

As far as Great Britain is concerned, I rest the proof of these several propositions principally upon two very simple principles.

I. That the increase of growing wealth in every nation in a given period, is necessarily limited by the quantity of capital it possesses at that period.

II. That Great Britain, with or without Ireland, and without any other dependency, can have no reasonable ground to apprehend injury from any one nation upon earth.

Turning to France, I substitute to the last of the two just-mentioned propositions the following: —

III. That France, standing singly, has at present nothing to fear from any other nation than Great Britain: nor, if standing clear of her foreign dependencies, would she have any thing to fear from Great Britain.

* Two original writers have gone before me in this line, Dean Tucker and Dr. Anderson. The object of the first was to persuade the world of the inutility of war, but more particularly of the war then raging when he wrote; the object of the second to show the inutility of the colonies.

XI. That supposing Great Britain and France thoroughly agreed, the principal difficulties would be removed to the establishment of a plan of general and permanent pacification for all Europe.

XII. That for the maintenance of such a pacification, general and perpetual treaties might be formed, limiting the number of troops to be maintained.

XIII. That the maintenance of such a pacification might be considerably facilitated, by the establishment of a common court of judicature for the decision of differences between the several nations, although such court were not to be armed with any coercive powers.

XIV. That secresy in the operations of the foreign department ought not to be endured in England; being altogether useless, and equally repugnant to the interests of liberty and to those of peace.

Proposition I.—That it is not the interest of Great Britain to have any foreign dependencies whatsoever.

The truth of this proposition will appear if we consider, 1*st*, That distant dependencies increase the chances of war, —

1. By increasing the number of possible subjects of dispute.

2. By the natural obscurity of title in case of new settlements or discoveries.

3. By the particular obscurity of the evidence resulting from the distance.

4. By men's caring less about wars when the scene is remote, than when it is nearer home.

2*d*, That colonies are seldom, if ever, sources of profit to the mother country.

Profitable industry has five branches: — 1. Production of new materials, including agricultures, mining, and fisheries; 2. Manufactures; 3. Home trade; 4. Foreign trade; 5. Carrying trade. The quantity of profitable industry that can be carried on in a country being limited by that of the capital which the country can command, it follows that no part of that quantity can be bestowed upon any one branch, but it must be withdrawn from, or withholden from, all the others. No encouragement, therefore, can be given to any one, but it must be a proportionable discouragement to all the others. Nothing can be done by government to induce a man to begin or continue to employ his capital in any one of those branches, but it must induce him in the same degree to withdraw or withhold that capital from all the rest. Of these five branches, no one is to such a degree more beneficial to the public than the rest, as that it should be worth its while to call forth the powers of law to give it an advantage. But if there were any, it would unquestionably be the improvement and cultivation of land. Every fictitious encouragement to any one of these rival branches being a proportionable discouragement to agriculture. Every encouragement to any of those branches of manufacture which produce articles that are at present sold to the colonies, is a proportionable discouragement to agriculture.

When colonies are to be made out to be beneficial to the mother country, and the quantum of the benefit is to be estimated, the mode in which the estimate is made is curious enough. An account is taken of what they export, which is almost the whole of their produce. All this, it is said, while you have the colonies, is yours; this is exactly what you lose if you lose your colonies. How much of all this is really yours? Not one single halfpenny. When they let you take it from them, do they give it you for nothing? Not they indeed; they make you pay for it just as anybody else would do. How much? Just so much as you would pay them if they belonged to themselves or to anybody else.

For maintaining colonies there are several avowed reasons, besides others which are not avowed: of the avowed reasons, by far the principal one is, the benefit of trade. If your colonies were not subject to you, they would not trade with you; they would not buy any of your goods, or let you buy any of theirs; at least, you could not be sure of their doing so: if they were subject to anybody else they would not do so; for the colonies of other nations are, you see, not suffered to trade with you. Give up your colonies, you give up so much of your trade as is carried on with your colonies. No; we do not give up any such thing, — we do not give up anything whatsoever. Trade with colonies cannot, any more than with anywhere else, be carried on without capital: just so much of our capital as is employed in our trade with the colonies — just so much of it is not employed elsewhere — just so much is either kept or taken from other trades.

Suppose, then, any branch of trade or manufacture to decline — even suppose it lost altogether — is this any permanent loss to the nation? Not the smallest. We know the worst that can happen from any such loss; the capital that would otherwise have been employed in the lost branch will be employed in agriculture. The loss of the colonies, if the loss of the colony trade were the consequence of the loss of the colonies, would at the worst be so much gain to agriculture.

Other reasons against distant dominion may be found in a consideration of the good of the government. Distant mischiefs make little impression on those on whom the remedying of them depends. A single murder committed in London makes more impression than if thousands of murders and other cruelties were committed in the East Indies. The situation of Hastings, only because he was pre-

sent, excited compassion in those who heard the detail of the cruelties committed by him with indifference.

The communication of grievances cannot be too quick from those who feel them to those who have the power to relieve them. The reason which in the old writs the king is made to assign for his interfering to afford relief, is the real cause which originally gave birth to that interference, — it is one of those few truths which have contrived to make their way through the thick cloud of lies and nonsense they contain. "See what it is that these people want," says the sovereign to the ministers of justice, "that I may not any more be troubled with their noise." The motive assigned to the unjust judge in the Gospel, is the motive which the sovereign, who is styled the fountain of justice, is thus made to avow.

The following, then, are the final measures which ought to be pursued: —

1. Give up all the colonies.

2. Found no new colonies.

The following is a summary of the reasons for giving up all the colonies: —

I. Interest of the mother-country.

1. Saving the expense of the establishments, civil and military.

2. Saving the danger of war — 1. For enforcing their obedience; 2. On account of the jealousy produced by the apparent power they confer.

3. Saving the expense of defending them, in case of war on other grounds.

4. Getting rid of the means of corruption afforded by the patronage — 1. Of their civil establishments; 2. Of the military force employed in their defence.

5. Simplifying the whole frame of government, and thereby rendering a competent skill in the business of government more attainable — 1. To the members of administration; 2. To the people.*

The stock of national intelligence is deteriorated by the false notions which must be kept up, in order to prevent the nation from opening its eyes and insisting upon the enfranchisement of the colonies.

At the same time, bad government results to the mother-country from the complication of interests, the indistinct views, and the consumption of time, occasioned by the load of distant dependencies.

II. Interest of the colonies.

Diminishing the chance of bad government resulting from — 1. Opposite interest; 2. Ignorance.

The real interests of the colony must be sacrificed to the imaginary interests of the mother-country. It is for the purpose of governing it badly, and for no other, that you can wish to get or to keep a colony. Govern it well, it is of no use to you. Govern it as well as the inhabitants would govern it themselves, — you must choose those to govern it whom they themselves would choose. You must sacrifice none of its interests to your own, — you must bestow as much time and attention to their interests as they would themselves: in a word, you must take those very measures, and none others, which they themselves would take. But would this be governing? and what would it be worth to you if it were?

After all, it would be impossible for you to govern them so well as they would govern themselves, on account of the distance.†

The following are approximating measures: —

1. Maintain no military force in any of the colonies.

2. Issue no moneys for the maintenance of any civil establishment in any of the colonies.

3. Nominate to the offices in the colonies as long as they permit you; — yield as soon as they contest such nomination.

4. Give general instructions to governors to consent to all acts presented to them.

5. Issue no moneys for fortifications.

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* Reasons for giving up Gibraltar: —

1. The expense of the military establishment, viz. fortifications, garrisons, ordnance, recruiting service, victualling.

2. The means of corruption resulting from the patronage.

3. The saving the danger of war with Spain, to which the possession of the place is a perpetual provocation.

4. The price that might be obtained from Spain for the purchase of it.

5. Saving the occasional expense of defending it and victualling it in war.

6. The possession of it is useless. It is said to be useful only on account of the Levant trade: — but, 1. We could carry on that trade equally well without Gibraltar. 2. If we could not, we should suffer no loss. The capital employed in that trade would be equally productive if employed in any other. 3. Supposing this the most productive of all trades, yet what we lost by losing Gibraltar would only be equal to the difference between the per centage gained in that trade and the per centage gained in the next most productive trade. For, 4. We could still do as the Swedes, Danes, Dutch, &c., and as we did before we had possession of Gibraltar.

Reasons for giving up the East Indies: —

1. Saving the danger of war.

2. Getting rid of the means of corruption resulting from the patronage, civil and military.

3. Simplifying the government.

4. Getting rid of prosecutions that consume the time of parliament, and beget suspicion of injustice.

5. Preventing the corruption of the morals of the natives by the example of successful rapacity.

† It is in proportion as we see things — as they are brought within the reach of our attention and observation — that we care for them. A minister who would not kill one man with his own hands, does not mind causing the death of myriads by the hands of others at a distance.

Proposition II. — That it is not the interest of Great Britain to have any treaty of alliance, offensive or defensive, with any other power whatever.

Reason: saving the danger of war arising out of them.

And more especially ought not Great Britain to guarantee foreign constitutions.

Reason: saving the danger of war resulting from the odium of so tyrannical a measure.

Proposition III. — That it is not the interest of Great Britain to have any treaty with any power whatsoever, for the purpose of possessing any advantages whatsoever, in point of trade, to the exclusion of any other nation whatsoever.

That the trade of every nation is limited by the quantity of capital is so plainly and obviously true, as to challenge a place among self-evident propositions. But self-evident propositions must not expect to be easily admitted, if admitted at all, if the consequences of them clash with prevalent passions and confirmed prejudices.

Nations are composed of individuals. The trade of a nation must be limited by the same causes that limit the trade of the individual. Each individual merchant, when he has as much trade as his whole capital, and all the credit he can get by means of his capital can suffice for carrying on, can have no more. This being true of each merchant, is not less true of the whole number of merchants put together.

Many books directly recognise the proposition, that the quantity of trade a nation can carry on is limited — limited by the quantity of its capital. None dispute the proposition; but almost all, somewhere or other, proceed upon the opposite supposition; they suppose the quantity of trade to have no limitation whatsoever.

It is a folly to buy manufactured goods; wise to buy raw materials Why? because you sell them to yourselves, or, what is still better, to foreigners, manufactured; and the manufacturer's profit is all clear gain to you. What is here forgotten is, that the manufacturer, to carry on his business, must have a capital; and that just so much capital as is employed in that way, is prevented from being employed in any other.

Hence the perfect inutility and mischievousness of all laws and public measures of government whatsoever, for the pretended encouragement of trade — all bounties in every shape whatsoever—all non-importation agreements and engagements to consume home manufactures in preference to foreign — in any other view than to afford temporary relief to temporary distress.

But of the two — prohibitions and bounties — penal encouragements and remuneratory — the latter are beyond comparison the most mischievous. Prohibitions, except while they are fresh, and drive men at a great expense out of the employments they are embarked in, are only nugatory. Bounties are wasteful and oppressive: they force money from one man in order to pay another man for carrying on a trade, which, if it were not a losing one, there would be no need of paying him for.

What then, are all modes of productive industry alike? May not one be more profitable than another? Certainly. But the favourite one is it, in fact, more profitable than any other? That is the question and the only question that ought to be put; and that is the very question which nobody ever thinks of putting.

Were it ever put and answered, and answered ever so clearly, it never could be of any use as a ground for any permanent plan of policy. Why? Because almost as soon as one branch is known to be more profitable than the rest, so soon it ceases so to be. — Men flock to it from all other branches, and the old equilibrium is presently restored. Your merchants have a monopoly as against foreigners? True, but they have no monopoly as against one another. Men cannot, in every instance, quit the less productive branch their capitals are already employed in, to throw them into this more productive one? True — but there are young beginners as well as old stagers; and the first concern of a young beginner, who has a capital to employ in a branch of industry, is to look out for the most profitable.

Objection: — Oh! but it is manufacture that creates the demand for the productions of agriculture. You cannot, therefore, increase the productions of agriculture but by increasing manufactures. No such thing. I admit the antecedent — I deny the consequence. Increase of manufactures certainly does create an increase in the demand for the productions of agriculture. Equally certain is it that the increase of manufactures is not necessary to produce an increase in that demand. Farmers can subsist without ribbons, gauzes, or fine cambrics. Weavers of ribbons, gauzes, or fine cambrics, cannot subsist without the productions of agriculture; necessary subsistence never can lose its value. Those who produce it are themselves a market for their produce. Is it possible that provisions should be too cheap? Is there any present danger of it? Suppose (in spite of the extreme absurdity of the supposition) that provisions were growing gradually too cheap, from the increase of the quantity produced, and the want of manufacturers to consume them, what would be the consequence? The increasing cheapness would increase the facility and disposition to marry: it would thence increase the population of the country; and the children thus produced, eating as they grew up, would keep down this terrible evil of a superabundance of provisions.

Provisions, the produce of agriculture, constantly and necessarily produce a market for themselves. The more provisions a man raises, over and above what is necessary for his own consumption, the more he has to give to others, to induce them to provide him with whatever, besides provisions, he chooses to have. In a word, the more he has to spare, the more he has to give to manufacturers; who, by taking it from him, and paying him with the produce of their labours, afford the encouragement requisite for the productions of the fruits of agriculture.

It is impossible, therefore, that you can ever have too much agriculture. It is impossible that while there is ground untilled, or ground that might be better tilled than it is, that any detriment should ensue to the community from the withholding or withdrawing capital from any other branch of industry, and employing it in agriculture. It is impossible, therefore, that the loss of any branch of trade can be productive of any detriment to the community, excepting always the temporary distress experienced by the individuals concerned in it for the time being, when the decline is a sudden one.

The following are the measures the propriety of which results from the above principles: —

1. That no treaties granting commercial preferences should be made.

2. That no wars should be entered into for compelling such treaties.

3. That no alliances should be contracted for the sake of purchasing them.

4. That no encouragements should be given to particular branches of trade, by —

(1.) Prohibition of rival manufactures.

(2.) Taxation of rival manufactures.

(3.) Bounties* on the trade meant to be favoured.

5. That no treaties should be entered into insuring commercial preferences.

They are useless as they add nothing to the mass of wealth; they only influence the direction of it.

Proposition IV. — That it is not the interest of Great Britain to keep up any naval force beyond what may be sufficient to defend its commerce against pirates.

It is unnecessary, except for the defence of the colonies, or for the purposes of war, undertaken either for the compelling of trade or the formation of commercial treaties.

Proposition V. — That it is not the interest of Great Britain to keep on foot any regulations whatsoever of distant preparation for the augmentation or maintenance of its naval force — such as the navigation act, bounties on the Greenland trade, and other trades regarded as nurseries for seamen.

* All bounties on particular branches of trade do rather harm than good,

This proposition is a necessary consequence of the foregoing one.

Propositions VI. VII. VIII. IX. & X.

Propositions similar to the foregoing are equally true applied to France.

Proposition XI. — That supposing Great Britain and France thoroughly agreed, the principal difficulties would be removed to the establishment of a plan of general and permanent pacification for all Europe.

Proposition XII. — That for the maintenance of such a pacification, general and perpetual treaties might be formed, limiting the number of troops to be maintained.†

If the simple relation of a single nation with a single other nation be considered, perhaps the matter would not be very difficult. The misfortune is, that almost everywhere compound relations are found. On the subject of troops, — France says to England, Yes I would voluntarily make with you a treaty of disarming, if there were only you; but it is necessary for me to have troops to defend me from the Austrians. Austria might say the same to France; but it is necessary to guard against Prussia, Russia, and the Porte. And the like allegation might be made by Prussia with regard to Russia.

Whilst as to naval forces, if it concerned Europe only, the difficulty might perhaps not be very considerable. To consider France, Spain and Holland, as making together a counterpoise to the power of Britain, — perhaps on account of the disadvantages which accompany the concert between three separate nations, to say nothing of the tardiness and publicity of procedures under the Dutch Constitution, — perhaps England might allow to all together a united force equal to half or more than its own.

An agreement of this kind would not be dishonourable. If the covenant were on one side only, it might be so. If it regard both parties together, the reciprocity takes away the acerbity. By the treaty which put an end to the first Punic war, the number of vessels that the Carthaginians might maintain was limited. This condition was it not humiliating? It might be: but if it were, it must have been because there was nothing correspondent to it on the side of the Romans. A treaty which placed all the security on one side, what cause could it have had for its source? It could only have had one — that is the avowed superiority of the party thus incontestably secured, — such a condition

† Precedents. — 1. Convention of disarmament between France and Britain 1787, — this is a precedent of the measure or stipulation itself; 2. Armed neutrality code, — this is a precedent of the mode of bringing about the measure, and may serve to disprove the impossibility of a general convention among nations; 3. Treaty forbidding the fortifying of Dunkirk.

could only have been a law dictated by the conqueror to the party conquered. The law of the strongest. None but a conqueror could have dictated it; none but the conquered would have accepted it.

On the contrary, whatsoever nation should get the start of the other in making the proposal to reduce and fix the amount of its armed force, would crown itself with everlasting honour. The risk would be nothing— the gain certain. This gain would be, the giving an incontrovertible demonstration of its own disposition to peace, and of the opposite disposition in the other nation in case of its rejecting the proposal.

The utmost fairness should be employed. The nation addressed should be invited to consider and point out whatever further securities it deemed necessary, and whatever further concessions it deemed just.

The proposal should be made in the most public manner:—it should be an address from nation to nation. This, at the same time that it conciliated the confidence of the nation addressed, would make it impracticable for the government of that nation to neglect it, or stave it off by shifts and evasions. It would sound the heart of the nation addressed. It would discover its intentions, and proclaim them to the world.

The cause of humanity has still another resource. Should Britain prove deaf and impracticable, let France, without conditions, emancipate her colonies, and break up her marine. The advantage even upon this plan would be immense, the danger none. The colonies I have already shown are a source of expense, not of revenue, — of burthen to the people, not of relief. This appears to be the case, even upon the footing of those expenses which appear upon the face of them to belong to the colonies, and are the only ones that have hitherto been set down to their account. But in fact the whole expense of the marine belongs also to that account, and no other. What other destination has it? What other can it have? None. Take away the colonies, what use would there be for a single vessel, more than the few necessary in the Mediterranean to curb the pirates.

In case of a war, where at present (1789) would England make its first and only attack upon France? In the colonies. What would she propose to herself from success in such an attack? What but the depriving France of her colonies. Were these colonies — these bones of contention — no longer hers, what then could England do? what could she wish to do?

There would remain the territory of France; with what view could Britain make any attack upon it in any way? Not with views of permanent conquest; — such madness does not belong to our age. Parliament itself, one may venture to affirm, without paying it any very extraordinary compliment, would not wish it. It would not wish it, even could it be accomplished without effort on our part, without resistance on the other. It would not, even though France herself were to solicit it. No parliament would grant a penny for such a purpose. If it did, it would not be a parliament a month. No king would lend his name to such a project. He would be dethroned as surely and as deservedly as James the Second. To say, I will be king of France, would be to say, in other words, I will be absolute in England.

Well, then, no one would dream of conquest. What other purpose could an invasion have? The plunder and destruction of the country. Such baseness is totally repugnant, not only to the spirit of the nation, but to the spirit of the times. Malevolence could be the only motive — rapacity could never counsel it; long before an army could arrive anywhere, everything capable of being plundered would be carried off. Whatever is portable, could be much sooner carried off by the owners, than by any plundering army. No expedition of plunder could ever pay itself.*

Such is the extreme folly, the madness of war: on no supposition can it be otherwise than mischievous, especially between nations circumstanced as France and England. Though the choice of the events were absolutely at your command, you could not make it of use to you. If unsuccessful, you may be disgraced and ruined: if successful, even to the height of your wishes, you are still but so much the worse. You would still be so much the worse, though it were to cost you nothing. For not even any colony of your own planting, still less a conquest of your own making, will so much as pay its own expenses.

The greatest acquisitions that could be conceived would not be to be wished for, — could they even be attained with the greatest certainty, and without the least expense. In war, we are as likely not to gain as to gain

* This brings to recollection the achievements of the war from 1755 to 1763. The struggle betwixt prejudice and humanity produced in conduct a result truly ridiculous. Prejudice prescribed an attack upon the enemy in his own territory, — humanity forbade the doing him any harm. Not only nothing was gained by these expeditions, but the mischief done to the country invaded was not nearly equal to the expense of the invasion. When a Japanese rips open his own belly, it is in the assurance that his enemy will follow his example. But in this instance, the Englishman ripped open his own belly that the Frenchman might get a scratch. Why was this absurdity acted? Because we were at war, — and when nations are at war something must be done, or at least appear to be done; and there was nothing else to be done. France was already stripped of all its distant dependencies.

— as likely to lose as to do either: we can neither attempt the one, nor defend ourselves against the other, without a certain and most enormous expense.

Mark well the contrast. All trade is in its essence advantageous — even to that party to whom it is least so. All war is in its essence ruinous; and yet the great employments of government are to treasure up occasions of war, and to put fetters upon trade.

Ask an Englishman what is the great obstacle to a secure and solid peace, he has his answer ready:—It is the ambition, perhaps he will add, the treachery of France. I wish the chief obstacle to a plan for this purpose were the dispositions and sentiments of France! — were that all, the plan need not long wait for adoption.

Of this visionary project, the most visionary part is without question that for the emancipation of distant dependencies. What will an Englishman say, when he sees two French ministers* of the highest reputation, both at the head of their respective departments, both joining in the opinion, that the accomplishment of this event, nay the speedy accomplishment of it, is inevitable, and one of them scrupling not to pronounce it as eminently desirable.

It would only be the bringing things back on these points to the footing they were on before the discovery of America. Europe had then no colonies — no distant garrisons — no standing armies. It would have had no wars but for the feudal system — religious antipathy — the rage of conquest — and the uncertainties of succession. Of these four causes, the first is happily extinct everywhere — the second and third almost everywhere, and at any rate in France and England — the last might, if not already extinguished, be so with great ease.

The moral feelings of men in matters of national morality are still so far short of perfection, that in the scale of estimation, justice has not yet gained the ascendency over force. Yet this prejudice may, in a certain point of view, by accident, be rather favourable to this proposal than otherwise. Truth, and the object of this essay, bid me to say to my countrymen, it is for you to begin the reformation — it is you that have been the greatest sinners. But the same considerations also lead me to say to them, you are the strongest among nations: though justice be not on your side, force is; and it is your force that has been the main cause of your injustice. If the measure of moral approbation had been brought to perfection, such positions would have been far from popular, prudence would have dictated the keeping them out of sight, and the softening them down as much as possible.

Humiliation would have been the effect produced by them on those to whom they appeared true—indignation on those to whom they appeared false. But, as I have observed, men have not yet learned to tune their feelings in unison with the voice of morality in these points. They feel more pride in being accounted strong, than resentment at being called unjust: or rather, the imputation of injustice appears flattering rather than otherwise, when coupled with the consideration of its cause. I feel it in my own experience; but if *I*, listed as I am as the professed and hitherto the only advocate in my own country in the cause of justice, set a less value on justice than is its due, what can I expect from the general run of men?

Proposition XIII.—That the maintenance of such a pacification might be considerably facilitated, by the establishment of a common court of judicature, for the decision of differences between the several nations, although such court were not to be armed with any coercive powers.

It is an observation of somebody's, that no nation ought to yield any evident point of justice to another. This must mean, evident in the eyes of the nation that is to judge, — evident in the eyes of the nation called upon to yield. What does this amount to? That no nation is to give up anything of what it looks upon as its rights — no nation is to make any concessions. Wherever there is any difference of opinion between the negociators of two nations, war is to be the consequence.

While there is no common tribunal, something might be said for this. Concession to notorious injustice invites fresh injustice.

Establish a common tribunal, the necessity for war no longer follows from difference of opinion. Just or unjust, the decision of the arbiters will save the credit, the honour of the contending party.

Can the arrangement proposed be justly styled visionary, when it has been proved of it—that

1. It is the interest of the parties concerned.
2. They are already sensible of that interest.
3. The situation it would place them in is no new one, nor any other than the original situation they set out from.

Difficult and complicated conventions have been effectuated: for examples, we may mention, —

1. The armed neutrality.
2. The American confederation.
3. The German diet.
4. The Swiss league.

Why should not the European fraternity

* Turgot and Vergennes.

subsist, as well as the German diet or the Swiss league? These latter have no ambitious views. Be it so; but is not this already become the case with the former?

How then shall we concentrate the approbation of the people, and obviate their prejudices?

One main object of the plan is to effectuate a reduction, and that a mighty one, in the contributions of the people. The amount of the reduction for each nation should be stipulated in the treaty; and even previous to the signature of it, laws for the purpose might be prepared in each nation, and presented to every other, ready to be enacted, as soon as the treaty should be ratified in each state.

By these means the mass of the people, the part most exposed to be led away by prejudices, would not be sooner apprized of the measure, than they would feel the relief it brought them. They would see it was for their advantage it was calculated, and that it could not be calculated for any other purpose.

The concurrence of all the maritime powers, except England, upon a former occasion, proved two points: the reasonableness of that measure itself, and the weakness of France in comparison with England. It was a measure not of ambition, but of justice — a law made in favour of equality — a law made for the benefit of the weak. No sinister point was gained, or attempted to be gained by it. France was satisfied with it. Why? because she was weaker than Britain; she *could* have no other motive — on no other supposition could it have been of any advantage to her. Britain was vexed at it. Why? For the opposite reason: she could have no other.

Oh my countrymen! purge your eyes from the film of prejudice — extirpate from your hearts the *black specks* of excessive jealousy, false ambition, selfishness, and insolence. The operations may be painful; but the rewards are glorious indeed! As the main difficulty, so will the main honour be with you.

What though wars should hereafter arise? the intermediate savings will not the less be so much clear gain.

Though, in the generating of the disposition for war, unjust ambition has doubtless had by far too great a share, yet jealousy, sincere and honest jealousy, must be acknowledged to have had a not inconsiderable one. Vulgar prejudice, fostered by passion, assigns the heart as the seat of all the moral diseases it complains of; but the principal and more frequent seat is really the head: it is from ignorance and weakness that men deviate from the path of rectitude, more frequently than from selfishness and malevolence. This is fortunate; — for the power of information and reason, over error and ignorance is much greater and much surer than that of exhortation, and all the modes of rhetoric, over selfishness and malevolence.

It is because we do not know what strong motives other nations have to be just, what strong indications they have given of the disposition to be so, how often we ourselves have deviated from the rules of justice,—that we take for granted, as an indisputable truth, that the principles of injustice are in a manner interwoven into the very essence of the hearts of other men.

The diffidence, which forms part of the character of the English nation, may have been one cause of this jealousy. The dread of being duped by other nations — the notion that foreign heads are more able, though at the same time foreign hearts are less honest than our own, has always been one of our prevailing weaknesses. This diffidence has perhaps some connexion with the *mauvaise honte* which has been remarked as commonly showing itself in our behavour, and which makes public speaking and public exhibition in every line a task so much more formidable to us than to other people.

This diffidence may, perhaps, in part be accounted for, from our living less in society, and accustoming ourselves less to mixed companies, than the people of other nations.

But the particular cast of diffidence in question, the apprehension of being duped by foreign powers, is to be referred in part, and perhaps principally, to another cause — the jealousy and slight opinion we entertain of our ministers and public men; we are jealous of them as our superiors, contending against us in the perpetual struggle for power; we are diffident of them as being our fellow-countrymen, and of the same mould as ourselves.

Jealousy is the vice of narrow minds; — confidence the virtue of enlarged ones. To be satisfied that confidence between nations is not out of nature where they have worthy ministers, one need but read the account of the negotiation between De Wit and Temple, as given by Hume. I say, by Hume: — for as it requires negotiators like De Wit and Temple to carry on such a negotiation in such a manner, so it required a historian like Hume to do it justice. For the vulgar among historians know no other receipt for writing that part of history than the finding out whatever are the vilest and basest motives capable of accounting for men's conduct in the situation in question, and then ascribing it to those motives without ceremony and without proof.

Temple and De Wit, whose confidence in each other was so exemplary and so just — Temple and De Wit were two of the wisest as well as most honourable men in Europe. The age which produced such virtue, was, however, the age of the pretended popish plot, and of a thousand other enormities

which cannot now be thought of without horror. Since then, the world has had upwards of a century to improve itself in experience, in reflection, in virtue. In every other line its improvements have been immense and unquestioned. Is it too much to hope that France and England might produce not a Temple and a De Wit,—virtue so transcendent as theirs would not be necessary,—but men who, in happier times, might achieve a work like theirs with less extent of virtue.

Such a Congress or Diet might be constituted by each power sending two deputies to the place of meeting; one of these to be the principal, the other to act as an occasional substitute.

The proceedings of such Congress or Diet should be all public.

Its power would consist,—1. In reporting its opinion;

2. In causing that opinion to be circulated in the dominions of each state.

Manifestoes are in common usage. A manifesto is designed to be read either by the subjects of the state complained of, or by other states, or by both. It is an appeal to them. It calls for their opinion. The difference is, that in that case nothing of proof is given; no opinion regularly made known.

The example of Sweden is alone sufficient to show the influence which treaties, the acts of nations, may be expected to have over the subjects of the several nations, and how far the expedient in question deserves the character of a weak one, or the proposal for employing and trusting to it, that of a visionary proposal.

The war commenced by the king of Sweden against Russia, was deemed by his subjects, or at least a considerable part of them, offensive, and as such, contrary to the constitution established by him with the concurrence of the states. Hence a considerable part of the army either threw up their commissions or refused to act; and the consequence was, the king was obliged to retreat from the Russian frontier and call a diet.

This was under a government, commonly, though not truly, supposed to be changed from a limited monarchy, or rather aristocracy, to a despotic monarchy. There was no act of any recognised and respected tribunal to guide and fix the opinion of the people. The only document they had to judge from was a manifesto of the enemy, couched in terms such as resentment would naturally dictate, and therefore none of the most conciliating, — a document which had no claim to be circulated, and of which the circulation, we may be pretty well assured, was prevented as much as it was in the power of the utmost vigilance of the government to prevent it.

3. After a certain time, in putting the refractory state under the ban of Europe

There might, perhaps, be no harm in regulating, as a last resource, the contingent to be furnished by the several states for enforcing the decrees of the court. But the necessity for the employment of this resource would, in all human probability, be superseded for ever by having recourse to the much more simple and less burthensome expedient, of introducing into the instrument by which such court was instituted, a clause guaranteeing the liberty of the press in each state, in such sort, that the diet might find no obstacle to its giving, in every state, to its decrees, and to every paper whatever which it might think proper to sanction with its signature, the most extensive and unlimited circulation.

Proposition XIV.—That secresy in the operations of the foreign department in England ought not to be endured, being altogether useless, and equally repugnant to the interests of liberty and peace.

The existence of the rule which throws a veil of secresy over the transactions of the Cabinet with foreign powers, I shall not take upon me to dispute — my objection is to the propriety of it.

Being asked in the House of Lords by Lord Stormont* about secret articles, the minister for foreign affairs refuses to answer. I blame him not. Subsisting rules, it seems to be agreed, forbid reply. They throw a general veil of secresy over the transactions of the Cabinet with foreign powers. I blame no man for the fault of the laws. It is these laws that I blame as repugnant to the spirit of the constitution, and incompatible with good government.

I take at once the boldest and the broadest ground — I lay down two propositions: —

1. That in no negociation, and at no period of any negociation, ought the negociations of the cabinet in this country to be kept secret from the public at large; much less from parliament and after inquiry made in parliament.†

2. That whatever may be the case with preliminary negociations, such secresy ought never to be maintained with regard to treaties actually concluded.

In both cases, to a country like this, such secresy is equally mischievous and unnecessary.

It is mischievous. Over measures of which you have no knowledge, you can apply no controul. Measures carried on without your knowledge you cannot stop, — how ruinous soever to you, and how strongly soever you would disapprove of them if you knew them. Of negociations with foreign powers carried

* May 22, 1789.

† It lies upon the other side, at least, to put a case in which want of secresy may produce a specific mischief.

on in time of peace, the principal terminations are treaties of alliance, offensive or defensive, or treaties of commerce. But by one accident or other, everything may lead to war.

That in new treaties of commerce as such, there can be no cause for secresy, is a proposition that will hardly be disputed. Only such negociations, like all others, may eventually lead to war, and everything connected with war, it will be said, may come to require secresy.

But rules which admit of a minister's plunging the nation into a war against its will, are essentially mischievous and unconstitutional.

It is admitted that ministers ought not to have it in their power to impose taxes on the nation against its will. It is admitted that they ought not to have it in their power to maintain troops against its will. But by plunging it into war without its knowledge they do both.

Parliament may refuse to carry on a war after it is begun: — Parliament may remove and punish the minister who has brought the nation into a war.

Sorry remedies these; add them both together, their efficacy is not worth a straw. Arrestment of the evil, and punishment of the authors, are sad consolations for the mischief of a war, and of no value as remedies in comparison with prevention. Aggressive war is a matter of choice: defensive, of necessity. Refusal of the means of continuing a war is a most precarious remedy, a remedy only in name. What, when the enemy is at your doors, refuse the materials for barricading them?

Before aggression, war or no war depends upon the aggressor; — once begun, the party aggrieved acquires a vote: He has his negative upon every plan for terminating the war. — What is to be done? Give yourself up without resistance to the mercy of a justly exasperated enemy? But this or the continuance of the war, is all the choice that is now left. In what state of things can this remedy be made to serve? Are you unsuccessful? — the remedy is inapplicable. Are you successful? — nobody will call for it.

Punishment of the authors of the war, punishment whatever it may be to the personal adversaries of the ministers, is no satisfaction to the nation. This is self-evident; but what is closer to the purpose and not less true, is, that in a case like this, the fear of punishment on such an account is no check to them: of a majority in parliament they are in possession, or they would not be ministers. That they should be abandoned by this majority is not in the catalogue of events that ought to be looked upon as possible: but between abandoning them and punishing them, there is a wide difference. Lord North was abandoned in the American war: he was not punished for it. His was an honest error in judgment, unstained by any *malâ fide* practice, and countenanced by a fair majority in parliament. And so may any other impolitic and unjust war be. This is not a punishing age. If bribe-taking, oppression, peculation, duplicity, treachery, every crime that can be committed by statesmen sinning against conscience, produce no desire to punish, what dependence can be placed on punishment in a case where the mischief may so easily happen without any ground for punishment? Mankind are not yet arrived at that stage in the track of civilization. Foreign nations are not yet considered as objects susceptible of an injury. For the citizens of other civilized nations, we have not so much feeling as for our negroes. There are instances in which ministers have been punished for making peace* — there are none where they have been so much as questioned for bringing the nation into war; and if punishment had been ever applied on such an occasion, it would be not for the mischief done to the foreign nation, but purely for the mischief brought upon their own; not for the injustice, but purely for the imprudence.

It has never been laid down as a rule that you should pay any regard to foreign nations: it has never been laid down that you should stick at anything which would give you an advantage in your dealings with foreign nations. On what ground could a minister be punished for a war, even the most unsuccessful, brought on by any such means? I did my best to serve you, he would say — the worse the measure was for the foreign nation, the more I took upon me: the greater therefore the zeal I showed for your cause: the event has proved unfavourable. Are zeal and misfortune to be represented as crimes?

A war unjust on the part of our own nation, by whose ministers it is brought on, can never be brought on but in pursuit of some advantage which, were it not for the injustice towards the foreign nation it would be for our interests to pursue. The injustice

* The fate of Queen Anne's last ministry may be referred in some degree to this cause: and owing to the particular circumstances of their conduct they perhaps deserved it. — See the Report of the Secret Committee of the House of Commons in the year 1715. The great crime of the Earl of Bute was making peace. The Earl of Shelburne was obliged to resign for having made peace. The great crime of Sir R. Walpole was keeping the peace. The nation was become tired of peace. Walpole was reproached with proposing half-a-million in the year for secret-service money. His errors were rectified — war was made — and in one year there was laid out in war four times what he had spent in the ten years before.

and the danger of retaliation being on all hands looked upon as nothing, the plea of the minister would always be, — "It was *your* interest I was pursuing." And the uninformed and unreflecting part of the nation, that is, the great body of the nation would echo to him, — "Yes, it was our interest you were preserving." The voice of the nation on these subjects can only be looked for in newspapers. But on these subjects the language of all newspapers is uniform:—"It is we that are always in the right, without a possibility of being otherwise. Against us other nations have no rights. If according to the rules of judging between individual and individual, we are right—we are right by the rules of justice: if not, we are right by the laws of patriotism, which is a virtue more respectable than justice."— Injustice, oppression, fraud, lying, whatever acts would be crimes, whatever habits would be vices, if manifested in the pursuit of individual interests, when manifested in pursuit of national interests, become sublimated into virtues. Let any man declare who has ever read or heard an English newspaper, whether this be not the constant tenor of the notions they convey. Party on this one point makes no difference. However hostile to one another on all other points, on this they have never but one voice — they write with the utmost harmony. Such are the opinions, and to these opinions the facts are accommodated as of course. Who would blush to misrepresent, when misrepresentation is a virtue?

But newspapers, if their voice make but a small part of the voice of the people, the instruction they give makes on these subjects the whole of the instruction which the people receive.

Such being the national propensity to error on these points, and to error on the worst side, the danger of parliamentary punishment for misconduct of this kind must appear equivalent to next to nothing, even in the eyes of an unconcerned and cool spectator. What must it appear then in the eyes of ministers themselves, acting under the seduction of self-partiality, and hurried on by the tide of business? No; the language which a minister on such occasions will hold to himself will be uniformly this,—"In the first place what I do is not wrong: in the next place, if it were, nothing should I have to fear from it."

Under the present system of secresy, ministers have, therefore, every seduction to lead them into misconduct; while they have no check to keep them out of it. And what species of misconduct? That in comparison of which all others are but peccadillos. Let a minister throw away £30,000 or £40,000 in pensions to his creatures. Let him embezzle a few hundred thousand for himself. What is that to fifty or a hundred millions, the ordinary burthen of a war? Observe the consequence. This is the department of all others in which the strongest checks are needful; at the same time, thanks to the rules of secresy of all the departments, this is the only one in which there are no checks at all. I say, then, the conclusion is demonstrated. The principle which throws a veil of secresy over the proceedings of the foreign department of the cabinet is pernicious in the highest degree, pregnant with mischiefs superior to everything to which the most perfect absence of all concealment could possibly give rise.

There still remains a sort of inexplicit notion which may present itself as secretly furnishing an argument on the other side. Such is the condition of the British nation: peace and war may be always looked upon as being to all human probability in good measure in her power. When the worst comes to the worst, peace may always be had by some unessential sacrifice. I admit the force of the argument: what I maintain is that it operates in my favour. Why? It depends upon two propositions, — the matchless strength of this country, and the uselessness of her foreign dependencies. I admit both. But both operate as arguments in my favour. Her strength places her above the danger of surprise, and above the necessity of having recourse to it to defend herself. The uselessness of her foreign dependencies prove *a fortiori*, the uselessness of engaging in wars for their protection and defence. If they are not fit to keep without war, much less are they worth keeping at the price of war. The inutility of a secret cabinet is demonstrated by this short dilemma. For offensive measures, cabinet secresy can never be necessary to this nation; for defence it can never be necessary to any.

My persuasion is that there is no state whatever in which any inconveniences capable of arising from publicity in this department would not be greatly overbalanced by the advantages; be the state ever so great or ever so small; ever so strong or ever so weak; be its form of government pure or mixed, single or confederated, monarchical, aristocratical, or democratical. The observations already given seem in all these cases sufficient to warrant the conclusion.

But in a nation like Britain, the safety of publicity, the inutility of secresy in all such business, stands upon peculiar grounds. Stronger than any two other nations, much stronger of course than any *one*, its superiority deprives it of all pretence of necessity of carrying points by surprise. Clandestine surprise is the resource of knavery and fear, of unjust ambition combined with weakness. Her matchless power exempts her from the one; her interest, if her servants could be

brought to be governed by her evident interests, would forbid the other.

Taking the interest of the first servant of the state as distinct from and opposite to the nation, clandestinity may undoubtedly be, in certain cases, favourable to the projects of sceptred thieves and robbers. Without taking the precautions of a thief, the Great Frederic might probably enough not have succeeded in the enterprise of stealing Silesia from her lawful sovereign. Without an advantage of this sort, the triple gang might, perhaps, not have found it quite so easy to secure what they stole from Poland. Whether there can or cannot exist occasions on which it might, in this point of view, be the interest of a king of Great Britain to turn highwayman, is a question I shall waive: but a proposition I shall not flinch from is, that it never can be the interest of the nation to abet him in it. When those sceptred sinners sold themselves to the service of Mammon, they did not serve him for nought: the booty was all their own. Were we (I speak as one of the body of the nation) to assist our king in committing a robbery upon France, the booty would be his. He would have the naming to the new places, which is all the value that in the hands of a British robber such booty can be of to anybody. The privilege of paying for the horse and pistols is all that would be ours. The booty would be employed in corrupting our confidential servants: and this is the full and exact amount of what we should get by it.

Conquests made by New Zealanders have some sense in them; while the conquered fry, the conquerers fatten. Conquests made by the polished nations of antiquity, — conquests made by Greeks and Romans, — had some sense in them. Lands, moveables, inhabitants, everything went into the pocket. The invasions of France in the days of the Edwards and the Henrys, had a rational object. Prisoners were taken, and the country was stripped to pay their ransom. The ransom of a single prisoner, a Duke of Orleans, exceeded one-third of the national revenue of England.

Conquests made by a modern despot of the continent have still some sense in them. The new property being contiguous, is laid on to his old property; the inhabitants, as many as he thinks fit to set his mark upon, go to increase his armies; their substance, as much as he thinks fit to squeeze from them, goes into his purse.

Conquests made by the British nation would be violations of common sense, were there no such thing as justice. They are bungling imitations of miserable originals, bating the essential circumstances. Nothing but confirmed blindness and stupidity can prompt us to go on imitating Alexander and Cæsar, and the New Zelanders, and Catherine and Frederic, without the profit.

If it be the king alone who gets the appointment to the places, it is a part of the nation, it may be said, that gets the benefit of filling them. A precious lottery! Fifty or one hundred millions the cost of the tickets. So many years purchase of ten or twenty thousand a-year, the value of the prizes. This if the scheme succeed: — what if it fail?

I do not say there are no sharers in the plunder: — it is impossible for the head of a gang to put the whole of it into his own pocket. All I contend for is, that robbery by wholesale is not so profitable as by retail: — if the whole gang together pick the pockets of strangers to a certain amount, the ring-leaders pick the pockets of the rest to a much greater. Shall I or shall I not succeed in persuading my countrymen that it is not their interest to be thieves?

"Oh, but you mistake!" cries somebody, "we do not now make war for conquests, but for trade." More foolish still. This is a still worse bargain than before. Conquer the whole world, it is impossible you should increase your trade one halfpenny: — it is impossible you should do otherwise than diminish it. Conquer little or much, you pay for it by taxes: — but just so much as a merchant pays in taxes, just so much he is disabled from adding to the capital he employs in trade. Had you two worlds to trade with, you could only trade with them to the amount of your capital, and what credit, you might meet with on the strength of it. This being true of each trader, is so of all traders. Find a fallacy in this short argument if you can. If you obtained your new right of trading given you for nothing, you would not be a halfpenny the richer: if you paid for them by war or preparations for war; by just so much as you paid for these you would be the poorer.

The good people of England, along with the right of self-government, conquered prodigious right of trade. The revolution was to produce for them not only the blessings of security and power, but immense and sudden wealth. Year has followed after year, and to their endless astonishment, the progress to wealth has gone on no faster than before. One piece of good fortune still wanting, they have never thought of: — that on the day their shackles were knocked off, some kind sylph should have slipped a few thousand pounds into every man's pocket. There is no law against my flying to the moon. Yet I cannot get there. Why? Because I have no wings. What wings are to flying, capital is to trade.

There are two ways of making war for trade, — forcing independent nations to let you trade with them, and conquering nations, or pieces of nations, to make them trade with

you. The former contrivance is to appearance the more easy, and the policy of it the more refined. The latter is more in the good old way, and the king does his own business and the nation's at the same time. He gets the naming to the places: and the nation cannot choose but join with him, being assured that it is all for the sake of getting them the trade. The places he lays hold of, good man, only out of necessity, and that they may not go a-begging: — on his own account, he has no more mind for them than a new-made bishop for the mitre, or a new-made speaker for the chair. To the increase of trade, both these plans of war equally contribute. What you get in both cases is the pleasure of the war.

The legal right of trading to part of America was conquered by France from Britain in the last war. What have they got by it? They have got Tobago, bankruptcy, and a revolution, for their fifty millions. Ministers, who to account for the bankruptcy are forced to say something about the war, call it a national one: — the king has not got by it, — therefore the nation has. What has it got? A fine trade, were there but capital to carry it on. With such room for trade, how comes there to be no more of it? This is what merchants and manufacturers are putting themselves to the torture to account for. The sylph so necessary elsewhere, was still more necessary to France; since, over and above her other work, there was the fifty millions spent in powder and shot to replace.

The King of France, however, by getting Tobago, probably obtained two or three thousand pounds worth of places to give away. This is what he got, and this is all that anybody got for the nation's fifty millions. Let us go on as we have begun, strike a bold stroke, take all their vessels we can lay hold of without a declaration of war, and who knows but what we may get it back again. With the advantages we now have over them, five times the success they are so pleased with, would be but a moderate expectation. For every fifty millions thus laid out, our king would get in places to the amount, not of two or three thousand pounds only, but say of ten, fifteen, or twenty thousand pounds. All this would be prodigious glory — and fine paragraphs and speeches, thanksgivings, and birth-day odes, might be sung and said for it: but for economy, I would much rather give the king new places to the same amount at home, if at this price his ministers would sell us peace.

The conclusion is, that as we have nothing to fear from any other nation or nations, nor want anything from other nations, we can have nothing to say to other nations, nor to hear from them, — that might not be as public as any laws. What then is the veil of secresy that enwraps the proceedings of the cabinet? A mere cloak for wickedness and folly — a dispensation to ministers to save them from the trouble of thinking — a warrant for playing all manner of mad and silly pranks, unseen and uncontrouled — a licence to play at hazard with their fellows abroad, staking our lives and fortunes upon the throw.

What, then, is the true use and effect of secresy? That the prerogatives of place may furnish an aliment to petty vanity, — that the members of *the circulation* may have as it were a newspaper to themselves, — that under favour of the monopoly, ignorance and incapacity may put on airs of wisdom, — that a man, unable to write or speak what is fit to be put into a newspaper, may toss up his head and say, I don't read newspapers — as if a parent were to say I don't trouble my head about schoolmasters, — and that a minister, secure from scrutiny in that quarter, may have the convenient opportunity, upon occasion, of filling the posts with obsequious cyphers, instead of effective men: — anything will do to make a minister whose writing may be written for him, and whose duty in speaking consists in silence.

This much must be confessed: — if secresy as against the nation be useless and pernicious to the nation, it is not useless and pernicious with regard to its servants. It forms part of the *douceurs* of office — a perquisite which will be valued in proportion to the insignificance of their characters and the narrowness of their views. It serves to pamper them up with notions of their own importance, and to teach the servants of the people to look down upon their masters.

Oh! — but if everything that were written were liable to be made public, were published, who would treat with you abroad? Just the same persons as treat with you at present. Negotiations, for fear of misrepresentation, would perhaps be committed somewhat more to writing than at present; — and where would be the harm? The king and his ministers might not have quite such such copious accounts, true or false, of the tittle-tattle of each court: or they must put into different hands the tittle-tattle, and the real business. And suppose your head servants were not so minutely acquainted with the mistresses and buffoons of kings and their ministers, — what matters it to you as a nation, who have no intrigues to carry on, no petty points to compass?

It were an endless task to fill more pages with the shadows that might be conjured up in order to be knocked down. I leave that task to any that will undertake it. I challenge party men — I invite the impartial lovers of their country and mankind to discuss the question — to ransack the stores of history, and imagination as well as history, for cases actual or possible, in which the want of secrecy in this line of business can be

shown to be attended with any substantial prejudice.

As to the constitution, the question of cabinet-secresy having never been tried by the principles of the constitution, has never received a decision. The good old Tudor and Stuart principles have been suffered to remain unquestioned here. Foreign politics are questions of state. Under Elizabeth and James, nothing was to be inquired into — nothing was to be known — everything was matter of state. On other points the veil has been torn away: but with regard to these, there has been a sort of tacit understanding between ministers and people.

Hitherto war has been the national rage: peace has always come too soon, — war too late. To tie up the ministers' hands and make them continually accountable, would be depriving them of numberless occasions of seizing those happy advantages that lead to war: it would be lessening the people's chance of their favourite amusement. For these hundred years past, ministers, to do them justice, have generally been more backward than the people — the great object has rather been to force them into war, than to keep them out of it. Walpole and Newcastle were both forced into war.

It admits of no doubt, if we are really for war, and fond of it for its own sake, we can do no better than let things continue as they are. If we think peace better than war, it is equally certain that the law of secresy cannot be too soon abolished.

Such is the general confusion of ideas — such the power of the imagination — such the force of prejudice — that I verily believe the persuasion is not an uncommon one;—so clear in their notions are many worthy gentlemen, that they look upon war, if successful, as a cause of opulence and prosperity. With equal justice might they look upon the loss of a leg as a cause of swiftness.

Well, but if it be not directly the cause of opulence, it is indirectly; from the successes of war, come, say they, our prosperity, our greatness; thence the respect paid to us by Foreign Powers — thence our security: and who does not know how necessary security is to opulence?

No; war is, in this way, just as unfavourable to opulence as in the other. In the present mode of carrying on war—a mode which it is in no man's power to depart from, security is in proportion to opulence. Just so far then as war is, by its direct effects, unfavourable to opulence, — just so far is it unfavourable to security.

Respect is a term I shall beg leave to change; respect is a mixture of fear and esteem, but for constituting esteem, force is not the instrument, but justice. The sentiment really relied upon for security is fear. By respect then is meant, in plain English, fear. But in a case like this, fear is much more adverse than favourable to security. So many as fear you, join against you till they think they are too strong for you, and then they are afraid of you no longer; — meantime they all hate you, and jointly and severally they do you as much mischief as they can. You, on your part, are not behindhand with them. Conscious or not conscious of your own bad intentions, you suspect theirs to be still worse. Their notion of your intentions is the same. Measures of mere self-defence are naturally taken for projects of aggression The same causes produce, on both sides, the same effects; each makes haste to begin for fear of being forestalled. In this state of things, if on either side there happen to be a minister or a would-be minister, who has a fancy for war, the stroke is struck, and the tinder catches fire.

At school, the strongest boy may perhaps be the safest. Two or more boys are not always in readiness to join against one. But though this notion may hold good in an English school, it will not bear transplanting upon the theatre of Europe.

Oh! but if your neighbours are really afraid of you, their fear is of use to you in another way — you get the turn of the scale in all disputes. Points that are at all doubtful, they give up to you of course. Watch the moment, and you may every now and then gain points that do not admit of doubt. This is only the former old set of fallacies exhibited in a more obscure form, and which, from their obscurity only, can show as new. The fact is, as has been already shown, there is no nation that has any points to gain to the prejudice of any other. Between the interests of nations, there is nowhere any real conflict: if they appear repugnant anywhere, it is only in proportion as they are misunderstood. What are these points? What points are these which, if you had your choice, you would wish to gain of them? Preferences in trade have been proved to be worth nothing, — distant territorial acquisitions have been proved to be worth less than nothing. When these are out of the question, what other points are there worth gaining by such means.

Opulence is the word I have first mentioned; but opulence is not the word that would be first pitched upon. The repugnancy of the connexion between war and opulence is too glaring: — the term opulence brings to view an idea too simple, too intelligible, too precise. Splendour, greatness, glory, these are terms better suited to the purpose. Prove first that war contributes to splendour and greatness, you may persuade yourself it contributes to opulence, because when you think of splendour you think of opulence. But splendour, greatness, glory, all these fine

things, may be produced by useless success, and unprofitable and enervating extent of dominion obtained at the expense of opulence; and this is the way in which you may manage so as to prove to yourself, that the way to make a man run the quicker is to cut off one of his legs. And true enough it is, that a man who has had a leg cut off, and the stump healed, may hop faster than a man who lies in bed with both legs broken, can walk. And thus you may prove that Britain is in a better case after the expenditure of a glorious war, than if there had been no war; because France or some other country, was put by it into a still worse condition.

In respect, therefore, of any benefit to be derived in the shape of conquest, or of trade —of opulence or of respect—no advantage can be reaped by the employment of the unnecessary, the mischievous, and unconstitutional system of clandestinity and secresy in negotiation.

APPENDIX.*—JUNCTIANA PROPOSAL.

PROPOSALS

FOR THE

ON OF THE TWO SEAS, — THE ATLANTIC AND THE PACIFIC,

BY MEANS OF A JOINT-STOCK COMPANY,

TO BE STYLED

THE JUNCTIANA COMPANY

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§ 1. *Grounds of expectation respecting the practicability of the proposed junction.*

THE most recent, as well as most determinate grounds, rest, it is believed, on the authority of the work, intituled, "Memoirs of the Mexican Revolution," &c. by William Davis Robinson, in two volumes 8vo, London, 1820: the author, a citizen of the United States, a gentleman of good character, well known to the legation of his own state here in London. In Volume II. Chapter XIII. p. 263 is devoted to this subject.

It speaks (II. 269.) of the measure in question as being known to have been a favourite measure of the last of the two Pitts. It certainly was in the contemplation of General Miranda, whose enterprise was undertaken under the protection of that minister. It was from Miranda that the Edinburgh Review derived the principal part of the information contained in its article on the subject, anno 1810.

Being so long posterior to Humboldt's great work, this of Mr. Robinson speaks of course (p. 265.) of the nine several supposed lines of junction, mentioned in that universally known work: but by Humboldt, in making the number of them so considerable, physical possibility is alone taken into consideration: length of voyage in respect of time, and consequently prospect of net profit, not being taken into the account: to which latter purpose, if the reports given by Mr. Robinson are to be depended upon, the *nine* will be found reduced to *one*.

Nothing can be more encouraging than the expectations held out by this account of his. Three spots, it is true, are mentioned. But of the three, taking the matter upon the face of his account of it, the one from Porto Bello on the Atlantic to Panamá on the Pacific, is decidedly impracticable: *another*, namely from the port formed by the river Guasacualco in the Atlantic, to Tehuantepec in the Pacific, not worth a thought in comparison with the

* The MSS. from which the following work is taken, bear date from 21st to 24th June 1822, and appear to have been prepared for the press under the author's superintendence. As the project brings out a practical illustration of the principles inculcated in the Essays on International Law, it is conceived that the account of it will form a suitable appendix to that work.

third: a chain of mountains running between the two seas, (p. 287,) and the only chance depending on the existence of some *ravine*, deep enough to afford a practicable passage for a cut.

In this third proposed course through the lake of Nicaragua, no mountains are in the way. From the river San Juan (in English St. John,) running from the lake into the Atlantic, it passes on to the Pacific, either through the lake of *Leon*, which by a river communicates with the lake of Nicaragua, or by a direct cut at a less distance.

The information he speaks of as being derived from a number of persons of different descriptions (names not mentioned,) by whom the tract of country in question had been visited. The sum of it is as follows: —

I. Elevation of the land.

Between both lakes and the Pacific, the ground "*a dead level.*"

II. Depth of water on the side of the Atlantic.

	Feet.
1. General depth over the bar at the mouth of St. John's River, . . .	12
2. In a particular part, ...	25
3. Depth in the river after the bar has been crossed, from fathoms 4, making,	24
to fathoms 6, making, ...	36
4. Depth of water in the Nicaragua Lake, from fathoms 3, making, ...	18
to fathoms 8, making, ...	48

5. In the Pacific Ocean, depths of water not stated in figures, but said to be "free from rocks and shoals; in one part," the Papagayo coast, "*the shore so bold, that a frigate may anchor within a few yards of the beach.*"

III. Length of a strait cut at different parts of the above dead level.

1. From Lake Nicaragua to the Pacific, in the Gulph of Papagayo, miles from 21 to 25.
2. From Lake Leon to the Pacific, on the coast of Nicoya, miles from 13 to 15.
3. From the Atlantic into Lake Nicaragua, up the River San Juan, "*Large brigs and schooners sail.*"

Length of a river by which Lake Leon communicates *already* with the sea, "Leagues 8," say miles 24.

Neither in Humboldt's Work, nor in any other as yet published, is any considerable part of the above information (it is believed) to be found.

Under these circumstances, the Nicaragua track seems to be the one, the only one, to which, in the present state of our knowledge here in Europe, the attention of capitalists can be directed, with a view to the formation of any such company as is here proposed.

§ 2. *Outline of the proposed agreement for the accomplishment of it.*

I. Situation and dimensions of the proposed spot.

Taking the conception of the spot from the view given of it in the maps to Pinkerton's Atlas, the greatest tract of territory that would be requisite to be allotted to the purpose would be, that which occupies, *in length*, somewhat less than four degrees of longitude, geographical miles say 220, namely, from the mouth of *St. John's* river in the Pacific; and in breadth, upon an average, a little more than a degree of latitude, geographical miles say a little more than 60. Upon the face of the map, the natural boundaries are, to the north, a chain of lofty mountains; to the south, another such chain, with the exception of the "*dead level*" above spoken of; to the east, the Atlantic; to the west, —in part the chain of mountains, having on the other side of it the territory of Costa Rica, — on other part, the Pacific.

In this tract of country may be seen the *maximum* of what it can be necessary should be ceded to the proposed company; whether, from this quantity, consistently with the accomplishment and perpetual maintenance of the junction for mutual and universal benefit, any and what defalcation can be made, will scarcely be ascertainable, until the necessary surveys have been made and reported.

Whatever may be the site and amount of it, call it for the present *Junctiana*.

II. Proposed source of benefit to the proposed company in a pecuniary shape.

1. The *price of transit*, whatsoever shape or shapes may be given to it: this price being to be received from the masters of all vessels making use of the communication.

2. The absolute property in the land (land covered with water included,) of all this territory, or of what lesser portion of it shall, on report of surveyors, as above, be deemed necessary and sufficient: thence, the right of selling it in parcels, and letting it out upon leases, for building and other purposes.

III. Proposed obligations of the company.

1. To pay to the local authorities a sum in the name of purchase money for the powers of government.

2. To pay the expense of the indemnification due to all such individuals, original inhabitants styled *Indians* included, as possess any interest in whatsoever land comes to be purchased: the value, so paid for, to be the present value only, not any such additional value as may be expected to be derived from the accomplishment of the measure. In case of disagreement, the prices to be referred to arbitration in manner hereinafter to be mentioned.

3 To defray the whole expense of effecting

and keeping up the communication: including, as well necessary *fortifications* towards the two seas, as necessary means of communication of all sorts, such as canals, locks, bridges, tunnels, &c.: and necessary receptacles of all sorts for vessels, such as docks, jetties, &c.

4. In respect of the *price of transit*, as above, the company to admit vessels of all states, at the outset and forever, on exactly the same footing, — the state or states with which the agreement is made, not excepted: no favour, direct or indirect, to be given to any one at the expense of any other state, or of all states.

5. So in respect of purchase and renting of land, as above.

6. Proposition to be made to the Anglo-American United States, to take the Junctiana Territory under their protection, by admitting it into their union: terms, except so far as shall be excepted, the same in principle with those upon which the recently admitted states have been admitted: admitted namely for a time, and while in a state of probation, under the administration of the President of the United States, and as soon as ripe, admitted on the same footing as those other states, and with the same sort of government. Considering the benefit which, in so many shapes, these United States would reap from the accomplishment of the junction, and the honour conferred on their nation by the proposed spontaneous choice, their concurrence seems hardly to be doubted of. As to this point, see § 8.

7. No *slavery*, in any shape, to be allowed: should any vessel, with any slave on board, obtain admittance into the territory, every such slave, upon his entrance within the territory, to be free.

N.B. — It seems essential that, considering the magnitude of the advances which the company would have to make before any returns could be expected, every security which the nature of the case admits of, should be afforded to it: and in particular against any changes to which in their origin, states so lately emancipated from so bad a form of government, cannot but appear to stand exposed; society and manners, on the part of so large a proportion of the population, being as yet on so unfavourable a footing. As to this point, see § 7.

For the preservation of its rights and powers from injury, the company might stipulate for its having the appointment of a governor of the state so constituted, with a negative upon all laws. But quere as to the need of this? See § 7.

8. The entire *price of transit*, at the rate of so much per ton, to be made known and always kept known to all persons concerned: no enhancement by particular and undeclared collateral charges.

9. The maximum of it to be determined by the agreement between the contracting parties: no enhancement except by mutual consent, in consequence of casual expenses and consequent net loss: expenses, the nature of which will be to be specified in the ultimate agreement.

§ 3. *Mexico—sacrifices eventually requisite—inducements to compliance.*

For the accomplishment of the measure upon the plan here submitted, the following are among the conditions necessary: —

1. That the expense be defrayed — not by the government to which the territory belongs, but by a joint-stock company.

2. That, for their security, the dominion, of the territory through which the communication is made, be ceded to the company.

3. That the dominion so ceded have — not on both sides of it a territory belonging to one and the same government; but, on one side, a territory belonging to one government, namely *Mexico*, — on the other side of it, a territory belonging to another government, namely *Columbia*.

4. That, for security to the capitalists, members of the joint-stock company, as well as for the benefit and satisfaction of all other nations interested, the territory in question be taken under the protection of the *Anglo-American United States*: of all other nations *interested*, — which is as much as to say, of all the other nations of the earth.

On this plan, at the hands of Mexico, certain sacrifices will, on certain suppositions, be requisite.

1. In Mexico, has any such idea yet been entertained, as that of executing the enterprise within her own dominions, and with capital to no greater amount than could be either raised by taxes, or obtained in some way or other from proprietors, subjects of her own government? In Columbia, there seems some ground for supposing that a conception to the like effect may perhaps have been entertained in relation to *herself*; forasmuch as, many months ago, a competent person was sent out from Europe by Columbia to make surveys in this view; and, on any such occasion, its own internal resources are the ways and means which a government would naturally look to, before it thought of extraneous ones.

In Mexico, should a persuasion to this effect have already obtained possession of men's minds, a proposal such as the present seems to have no great prospect of finding acceptance.

The probability, however, seems to be on the negative side.

1. The first point on which this part of the question will turn, is — what is the quantity of capital that will be requisite? As to this point, everything is, it must be confessed, in

utter darkness. Estimate being as yet altogether out of the question, what remains is loose conjecture, and without anything but the general nature of the enterprise for its ground. On this ground, no professional man would, it is believed, set the expense at less than several millions of pounds sterling — between four and five times as many dollars.

Whatsoever be the amount, thus much is however certain, that the expenditure would require to be kept running on — running on for a length of time, probably for several years, before any the least return for the money could be received.

That any such sum should be raised by taxes — raised by government in its infant, and as yet unsettled state — by taxes over and above all that will be requisite for carrying on the ordinary business of government, is an expectation of a result, which, upon the face of it, does not seem probable.

As to a capital to be raised without taxes — a capital to be furnished by a joint-stock company, having for its members, to an exclusive or principal amount, individuals belonging to the State of Mexico: — the formation of any such company depends upon two conditions: —

1. Upon the existence of capital, to such an amount, at the disposal of individuals.

2. Upon the inability of finding other applications for it, and those of an ordinary nature, that would be still more advantageous: applications, in the instance of which the employment given to it would be under the eye of the proprietor — at the choice of the proprietor — determined on each occasion by the will of the proprietor; and would not, as in this case, have to wait during an indefinite time, for every the smallest return.

If, for example, the information that has been received is correct, fifteen per cent. and more, and with an immediate return, may always be made of capital in *Mexico;* while, by an *English* capitalist, less than ten per cent., if placed upon a footing regarded by him as an assured one, would be caught at; and for this, or something not more than this, if possessed of sufficient means of living from other sources, he would even be content to wait. On the establishment of the London Docks for example, ten per cent. was the maximum looked to; and this was long before the commencement of that state of things, by which the profit capable of being expected from capital, has been of late years so much reduced.

This point being determined upon, if the determination be that a joint-stock company, formed by capitalists of all nations, foreigners as well as natives shall be resorted to; then comes the question about the portion of *territory*, and the *cession* to be made of it.

If the only portion that required to be ceded, were the portion to be purchased by the company for the purpose of the communication, that is to say, the portion through which the work would have to be carried on, thus far no great difficulty presents itself: thus far, by the supposition, Mexico would have her equivalent: the sacrifice would be such as she would be prepared to make: the equivalent, one with which, by the supposition, she would be satisfied.

But the difficulty, if there be any in the case, lies here. It is essential to the plan, that Columbia be not excluded from a share in that benefit which consists in contiguity — immediate contiguity — to the spot through which the communication is made. For this purpose it is necessary that, while on *one* side *Mexico* has the territory immediately contiguous to the territory through which the communication passes, *Columbia* should have the territory immediately contiguous to it on the *other* side. But, according to the latest account that has been made public, viz. Mr. Robinson's, as published in London, anno 1821, there is but one spot that affords any tolerably fair promise of any such junction on profitable terms; and *that* is a spot in which Lake *Nicaragua* is included; and if the information received be correct, not only the contiguous land on the side of *Mexico* is regarded as appertaining to Mexico, but also the contiguous land on the side of Columbia.

If this be not the case, if the claims or expectations of Mexico do not embrace *both* sides, here ends this difficulty: but if they do embrace both sides, then it is that the difficulty will have place; for then it is that by Mexico, according to the plan here proposed, a sacrifice to a certain amount will have to be made.

For its *direct* object, this plan has the securing the establishment of the communication for the benefit of all nations without exception; and more particularly for the benefit of Mexico, Columbia, and the Anglo-American States; these being the three nations to which local proximity will render it in a peculiar degree advantageous. But moreover, for its *collateral* objects it has the prevention of all that ill-will, as between Mexico and Columbia, of which the possession of so great an advantage to Mexico, to the exclusion of Columbia, could scarcely, the nature of man considered, fail of being productive betwixt Mexico and Columbia. With more propriety might it have been said, between Mexico on the one part, and on the other part Columbia, backed by all the other nations of the earth.

This heart-burning, this source of war and disappointment — this it is that presents itself to view as the great natural *stumbling-block* to the undertaking: this stumbling-block it is the principal object of this proposal to remove.

Suppose even that, by her own resources,

and within her own dominions, it were completely in the power of Mexico to establish the communication, still this stumbing-block would remain unremoved; a nation which for a long time, at sea at least, could not but remain a weak one: this weak nation, embarked in a project, presenting a face of injury to all the powers upon earth!

For the sake of *peace* in general, and for the *peace* and *safety* to Mexico in particular, this proposal has therefore for its *main* object, the preventing a possession thus important to all nations, from being endeavoured to be taken for a subject of exclusive property by any nation — to preserve it from becoming a bone of contention to all nations — to preserve it from this fate, by placing it in the conjunct hands of three nations, in the character of trustees for themselves and for all others without exception.

On the supposition, that Mexico has placed herself, and is known to have placed herself, in so dangerous a situation, and that the aid of capital from without is at the same time regarded by her as necessary, would any such capital to any such amount be found?

By capitalists, the danger against which, in this case, adequate security would be looked for, is not merely want of *inclination* to secure to them the stipulated benefits, but want of *ability*. But as to this point in the case supposed, the company would behold itself in a state of dependence, not only on Mexico herself, but on every other power, with which, either on the account here in question, or on any other, Mexico might, at any point of time, however distant, find herself in a state of hostility. Should any such hostility at any time have place (and can it rationally be supposed that it will not at any time have place?) the most prominent object would of course be this matchless jewel, — this matchless key to commercial advantage: the first endeavour would be either to take possession of it, or (as England did by the Washington capital) to destroy it; and in either case, what would be the condition of the company?

Hereupon comes the question — the security here proposed, will it be sufficient? O yes: that it will: this position requires a separate consideration; and the truth of it will be rendered (it is hoped) sufficiently manifest in another place. See § 8.

Upon the plan of universal benefit here proposed, all nations would behold in Mexico a friend. Upon the plan of exclusive benefit to Mexico, this plan of universal benefit being supposed rejected, and known to be rejected, all nations would behold in her an enemy. Upon the plan of universal benefit, all other nations, in their competition with these two nations and one another, are secured against every *disadvantage*, except that which has been established by the hand of nature; that is to say, *local distance*. Upon the plan of exclusive benefit, they would behold themselves exposed at all times to extortion — to extortion blind and boundless: they would look to the *Vistula*, to the *Elbe*, to the *Rhine:* in a word, to all those water communications which in Europe run through different states. All this they would look to; and, in the scene of self-pernicious selfishness, so universally and constantly exhibited in the old world, behold evidence but too conclusive of the like mixture of improbity and folly in the new.

To Columbia, such virtual hostility could scarce fail to be, in a peculiar degree, galling and irritative. To Mexico, to the exclusion of Columbia, the junction would, on this supposition, give the prodigious advantage of a water communication between her own ports in the Atlantic, and her own ports in the Pacific. Meantime, for this same advantage, in the case of Columbia, the demand is equally urgent.

Suppose her next neighbour in possession of it, and herself for ever either destitute of it, or dependent for it on the ever precarious good-will of a foreign state, — the very idea of such a state of things, — could it, consistently with the nature of man, fail to have irritation for its accompaniment? While they themselves are confined to the supremely tedious sea communication round Cape Horn, or to the not much less tedious internal communication up the rapid current of the river Magdalena, with a tedious land-carriage at the end of it — the mercantile men of that already-established republic, with their rulers at their back — is it in the nature of man they should look with other than an evil eye on their rivals in the Mexican state, if in the exclusive possession of so irresistible an instrument for throwing them out of the market?

The Columbians, it is well known to Mexicans, have, for a considerable time past, been regarding this jewel with a proprietary eye. After many unexpected delays, so late as February 1822, a civil engineer went from Europe to make surveys in this view. Exclusion from it would produce in *their* breasts the sensation of a loss. In the breast of *Mexicans*, the *non-acquisition* of it would not produce any such sensation as that of loss. By the acquisition of it, in equal shares, on the here-proposed partnership footing, the sensation of gain would be produced alike on both sides.

In this state of things, supposing the partnership plan rejected, if it were not *really* the interest, it would at any rate *appear* to be the interest, of all classes in the republic of Columbia, to act in a manner more or less declaredly hostile to Mexico — to obstruct the settlement of the government — to foment divisions — to keep the country in such a state of poverty, as should oppose an insuperable

bar to her putting herself in possession of so exclusive and invidious an advantage.

All this while, what should never be out of mind is, that for all these surmises, unpleasant as they are, not any of the parties concerned, but the penner of this proposal, and he alone is answerable. All individuals, on whom any thing depends, being on both sides alike unknown to him, the propensities so universal in human nature constitute the only source whence these indications of probable hostility have been derived.

A much more pleasing object of contemplation to him is the state of amity — cordial and durable amity — which the sort of partnership here proposed could not fail to number among its natural fruits. The infant state would behold in them its common parents. In the Anglo-American union, of whose kindness the Columbian republic has had such recent experience, and at whose hands the Mexican state has so sure an anticipation of the like kindness, they would behold a common friend, and a friend, in case of misunderstanding, whether on these or any other points; a common referee — a referee, such as for impartiality, probity, and sound sense, has assuredly never as yet been matched in the history of nations.

One advantage, however, it must be confessed there is, of which, in this plan, Mexico would put herself exclusively in possession: an advantage in which neither any other nation, nor even Columbia herself, could claim, any the least share. This is the glory of so extraordinary, not to say unexampled, a manifestation of the union of those two virtues, to which all other virtues are reducible — effective benevolence and self-regarding prudence. In fact, it would be nothing more than a sacrifice of personal interest ill understood, to personal interest well understood: still, so difficult to human weakness is every such sacrifice, so imperfectly understood as yet is the connexion between social and personal interest, that the characters of generosity would not the less assuredly stamp themselves, upon the face of the sacrifice, in the most conspicuous and unfading colours.

So much as between Mexico and Columbia. Now, as between Mexico and all other nations.

As, by refusal of this cession, Mexico would stand forth in the eyes of all other nations in the light of an enemy of their common welfare, so by consent to it, she would establish herself in the character — the conspicuous, the indisputable, the indelible character — not simply of a common friend, but of a benefactress — a common, universal, and unexampled benefactress. To her they would behold themselves indebted — not merely for a benefit, but for such a benefit as, unless it were without design or expectation on the part of the benefactor, the nations of the earth, taken in the aggregate, never yet received at the hands of any *one*. Gratitude is therefore an affection, of which, in so far as in minds so situated, any such social affection can have place, she will be an object in all eyes — in the eyes of the present generation, and of all future ones. By Spain, and Spain alone, can any exception to this observation be afforded. But no longer than the present delirium lasts, can this exception last: nations are not, like individuals, exposed to any such lamentable disease, as insanity coeval with existence — insanity beyond the reach of cure.

Howsoever liable to become faint, the colours of national *gratitude* may be, such is not the case with the impression made by respect. Respect is a tribute, which, where really due, not even the bitterest enemy can altogether refuse: and as to *time*, tribute in this shape, so far from being diminished, is even increased by it.

The cession—shall it be gratuitous?—shall it be for a price? — if for a price, by whom paid?—by Columbia in the whole—by the proposed company in the whole?—by Columbia and the proposed company in shares?—and if so, in what shares? Questions, these which of necessity must, in the present stage of the business, be left unanswered.

Thus much, however, may even here be mentioned; namely, that if by Mexico a price is looked for, self-regarding prudence may remain or not remain, — there at any rate ends *benevolence*, — effective benevolence, with whatever glory encircles a virtue of such matchless rarity among nations. There ends that glory to Mexico, and there commences embarrassment and obstruction. On a possession such as that in question, who shall fix a value? On what grounds can it be fixed? With an amount fixed upon without grounds, who will be satisfied? Be it what it may, who will be content to pay it? Meantime, thus much may be answered in the negative, and thence what follows from it in the affirmative. No *preference* must there be, in respect of the *price of transit*. By any such preference, the simplicity of the plan would be destroyed: the merit of it as towards all other nations would be destroyed: in this shape, an advantage could not be given to Mexico by Columbia against herself, without its being given as against all other nations. This shape being set aside, money seems therefore to be the only shape in which, if in any, advantage could on any such score be granted.

§ 4. *Columbia — her particular inducements to concurrence.*

After what has been said on the subject of those inducements which apply to the case of Mexico, next to nothing remains to be said of those which apply to the case of Columbia. On the proposed plan, none present them-

selves, but those in which she will be a sharer with Mexico: of these in the next section.

With regard to Columbia, thus much only remains to be said, namely, that if the glory of the cession is assumed by Mexico, as above, whatsoever net profit, in any more substantial shape, comes to be afforded by it, will fall of course to the share of Columbia.

§ 5. *Inducements common to Mexico and Columbia.*

For the next section is reserved the consideration of the more striking benefit, in which, upon the proposed plan, these two new states will see the old established Republic of the Anglo-American United States sharing with them, and yet without detriment to them, or either of them, in any shape. What remains for the present section will not require many words.

The spot ceded to the company for the formation and security of the communication, will naturally be a seat of new created opulence and population: elements of prosperity, rapidly increasing from the first, and till the spot shall have been incapable of holding any more, for ever on the increase.

A communication in any shape effected, commercial functionaries and agents would immediately repair to it from all nations, and with them or after them, men of all occupations from all nations on both sides of the American continent, the Asiatic, as well as the European. Junctiana, with its two principal towns, one on the Atlantic, the other on the Pacific, would present to every eye the civilized world in miniature.

The hands, of so many various descriptions, of whom in such multitudes the labour would be necessary—the functionaries of the superintending classes, whose presence would be necessary for the giving direction to all that labour — the members of the establishment, civil and military, which, upon a scale of even such perfect frugality, would still be necessary—all these multitudes put together, would form a sensible addition to the active population and circulating wealth of the territory, even from the very commencement of the work.

The narrower the spot thus allotted to the company, the more speedily of course will all this mass of wealth and population begin to run over, and spread itself over the two great states on each side of it. But be that as it may, the frontier on each side can scarce fail to be marked by a flowing tide of the matter of national prosperity in both shapes. Of this influx, so much as is formed by emigrants from other states will, with reference at least to the two states in question, be so much created, as it were out of nothing, and in this advantage no other nation will possess any the least share.

For anything like a clear or correct conception of the advantage derivable to any tract of country, from the accession of settlers in its immediate vicinity, recourse should be had to the state of things in this respect, in the Anglo-American United States, as depictured in the various printed accounts, that have from time to time been given of it, by statistical writers and travellers.

Felicity, in these shapes, has the advantage of presenting determinate conceptions, by being expressed in figures. Benefits, not susceptible of any such precise expression, but of still superior, because of anterior importance — anterior, as being the efficient causes of them—are those which will be derived, in the shape of mental improvement in every line, intellectual and moral together. In the little Republic of *Junctiana*, her two great neighbours, parents as they are to her, would enjoy the benefit of a common school, established under the eyes of both of them: an all-comprehensive school, of everything that is useful in art and science, but more particularly of those things that are most useful, — good legislation, good judicature, good government in every line. This, indeed, supposes and assumes, that the territory of Junctiana will be a member of the Anglo-American United States, and thereby, that the government will be in the only form to which that school can give admittance (see § 7,) for if it be in any other, nothing that is good can be answered for, on any tenable ground.

§ 6. *Inducements common to Mexico, Columbia, and the Anglo-American United States, — water communication between their ports on the one ocean, and their ports on the other.*

Of this benefit little need here be said, after the bare mention of it. Of the matters of fact on which the magnitude of it depends, nothing, in addition to that which the maps indicate, can here be said. To the inhabitants of the several territories, and in particular to those by whom they have been contemplated, with either a political or a commercial eye: to them, and to them almost alone, must the cognizance of this part of the field of consideration be referred.

For the present, and, doubtless, for a long time to come, by Mexico and Columbia will this benefit be possessed in by far the greatest magnitude. With its settlement in the Columbian River that empties itself into the Pacific, the confederation of which *Washington* is the capital, — *Washingtonia*, if for this purpose it may for the moment be called, — will, at the first, be in the state of the hen with one chick. But out of so fertile a womb, say who can, how many more such chicks may not be destined to be poured forth. At any rate, if it be worth while to keep her fed by a frequently interrupted water-carriage,

and at the end of it a land-carriage, over a chain of mountains of 200 miles in length, much more so must it be through a level and unbroken channel, of which dry land forms no part.

In the instance of all three states, this benefit, whatever may be the amount of it, has two mutually contrasted, yet intimately connected, advantages. To these states it belongs *exclusively*, as compared with all other states. At the same time, neither in the eyes of any one of those other states, can it be a ground of complaint, or an object of jealousy. If the act, of which it is the result, were the act of man — of man, with his selfish and anti-social arrangements — yes. But no; it is the act, not of partial and hostile man, but of impartial and bounteous Nature. Upon the here-proposed plan, the only acts in which man has any concern, will be so many manifestations of beneficence, universal and indisputable beneficence.

§ 7. *In the eyes of capitalists, the proposed protection at the hands of the Anglo-American United States, necessary and satisfactory.*

The party here considered, as that to which such protection would naturally be looked upon as necessary, is the proposed *company*; the body of men by whom, antecedently to all commencement of profit, so vast a capital will be to be expended.

1. First as to *necessity*.

Without such a security, it seems difficult to say in what quarter, for such a purpose, a prudent set of capitalists could behold a sufficient ground for confidence.

On the part of the state or states, out of whose territory the requisite spot of ground would be to be carved, two points (it has already been observed) would require to be established: the constancy of their *disposition* to perform their part of the engagement, and the permanency of their *power* so to do.

But in respect of both these points, not only now, but for an indefinite time to come, persons in the situation of those from whom the capital would have to come, cannot but be in a great degree in the dark.

Take in the first place *Columbia*, the first-born and best known of the two infant states.

1. At the time at which this line is writing, neither is Porto Cabello, the last port remaining to Spain in the Atlantic, known as yet to be in possession of Columbia, nor is the result of the expedition towards the Pacific as yet known. In any complete state, the Republic, therefore, is not as yet so much as formed.

2. Of the effect of its *constitution*, and of its deportment in a state of peace, no experience whatever can have as yet been had.

3. Of the founder of this state, the Liberator Bolivar, the character forms no doubt already a very considerable ground for the requisite sort of confidence. Not only does it stand high at present, but it has for a long time done so in the estimation of those countries from which the capital will have to come. But the life of a single person, and *that* still exposed to the chances of war, is but a slender prop to lean upon. Nor, for some time, owing to the state of her military occupations, can matters of a civil nature be so much as submitted to his cognizance.

One circumstance, indeed, there is, which it may not be improper to mention in this view, and which, to English and United States' capitalists, cannot but be of an encouraging nature. The five men in whose hands the executive power is at present; namely, General Santander, vice-president of the Republic, Mr. Gual, minister of Foreign affairs, Mr. Restropo, minister of the Interior, Mr. Castillo, minister of Finance, Mr. Briceno, minister of the War and Marine Department, are all of them, it seems, well acquainted with the English language; and to men of English lineage, acquaintance with the English language, will naturally serve as a sort of circumstantial evidence of English ideas and affections. Still, however, this, though it is no trifle, is all which, at the vast distance of Bogota, the present capital, from the place of inquiry, there has as yet been time for the public in England, or in the Anglo-American United States, to learn, even in relation to the executive government; and as to the executive government, it is but the organ of the legislative. In London, the constitution has, indeed, though only within these few days, been made public. But the constitution of a state is one thing, the conduct of the government and the people under the constitution, another thing; and of this there cannot as yet have been any the smallest portion of time for observation and experience to have applied themselves to.

True it is, that before the earliest time at which any agreement, grounded on this or any other basis, can have been entered into, light in a considerable degree may naturally be expected to have been cast upon all this darkness. A small number of years, however, how tranquilly and prosperously soever they may have passed on, can in such a case afford but a slight foundation for the appropriate confidence; and, in the mean time, if the present opportunity be not embraced, — when minds are on the alert, generous affections not yet cooled, and what is more determinately material, capital, which as yet is in an overflowing state, not yet settled, in channels from which it cannot be diverted, — this or that unfavourable turn, taken by the political machine, may have opposed a final bar to the accomplishment of this matchless work of universal beneficence.

Thus much even as to Columbia. As to Mexico, to the eye of an English capitalist, everything in that quarter is as yet in utter darkness.

The result seems to be — that, without adequate *extraneous* security — security on both the above points; namely, permanency of *inclination*, and permanency of power — without additional security, such as nothing but the guarantee of a fully established government can give, capital to a sufficient amount would have but small likelihood of finding a sufficient ground for confidence.

To what government, then, for any such purpose, can expectation turn itself? Assuredly to one alone: and *that* is, the government which has here already been so continually presented to notice — the government of the Anglo-American United States.

In that government, prudence is too consummate and too constant, to admit of its entering into any such engagement, without an assurance of adequate benefit to the great community entrusted to its care. The grounds for such assurance will be touched upon under the next head. Under the present, their sufficiency must be provisionally assumed.

The *company* will require sufficient assurance of its being permitted, at all times to come, to exact the *price of transit*, and the rents and profits of its lands. Meantime, for the exercise of the powers of government on a sufficiently frugal plan, and in particular for the appointment of fit functionaries, it stands irremediably incapacitated — incapacitated, partly by local distance, partly by its own unchangeable constitution — an aristocratical government, the shares in which will be continually shifting hands, objects of purchase and sale, no one of all these rulers knowing anything about his subjects, nor caring anything more about them than he knows.

Were the details of government in hands so circumstanced, a necessary consequence is, that in the minds of the leading men, in this instance as in every other, the prime object would be *patronage*. To render this source of profit the more productive, useless and needless offices would gradually be multiplied, the emolument attached to them swollen to the utmost possible amount, pensions of retreat added, and the richest of the offices improved into sinecures. The proprietors at large, not finding, any of them, adequate inducements to expend their time upon the details of the government or the management — no individual among them beholding any recompense for his labour, unless it were in the being let into a partnership of the sinister profit, in the repression of which the only service he could render would consist — these proprietors, the great majority of them, would at all times, with the necessarily accustomed blindness and negligence trust everything to those same leaders.

Thus, by the ever-beaten track — thus, as sure as man is man — would a government so constituted go on from worse to worse: the permanent prosperity, not only of its distant subjects, but of the company itself, that is to say, of the great majority of its members, offered up as a constant sacrifice to the particular and sinister interest, real or imagined, of a small junta of the leaders.

In a word, in neither of the two only shapes in question, could the profit be rendered permanent, by any other means than the establishment of a form of government, which had really for its object the greatest happiness of the greatest number of the people. But this it could not have, any further than in proportion to the share which the people themselves had in it. In such a situation as that in question, the people, it may be said, are not as yet of sufficient age to go alone. Such would assuredly not be the language in Columbia: such, it is hoped, would not be the language in Mexico. But such would but too naturally be the language in England. Well, then, in Washington may be seen an institution, which has long been in the habit of taking in infant states to nurse; witness Indiana, Illinois, Alabama, Missouri: and how excellent the system of *nursing* is — how admirable a dry nurse the President has always been — experience has abundantly testified. No sooner were the infants of an age to go alone, than the alacrity with which the leading strings would be taken off, has also been abundantly testified. Nor in all this is there anything to which any such imputation as that of vague theory can attach itself: it rests throughout on practice — long-continued and universally-notorious practice.

The circumlocution of "*the Anglo-American United States*," — a circumlocution as yet indispensable — for *these* are not at present the *only* American United States, — this circumlocution, howsoever where precision is an object, indispensable, is, to any other purpose, intolerable. Well, then — Washingtonia would, by the supposition, ease the company of the cares of government: she would do for the company, and continue to do, as she has always done, well, and to perfection, *that* which, for the company to do for itself, in any tolerable manner, and for any length of time, would be morally impossible.

The company being at the expense of the *fortifications*, these same fortifications would on both sides, — and in particular on that which is most material, the Atlantic side, — be in the hands of the company: here, so long as the fortifications remained untouched, would be even against the inhabitants themselves — the inhabitants of the Junctiana territory — a security, a substantial security for the main source of profit, the *price of transit*. Together with the fortifications, to the

company would belong the function and expense of garrisoning them. This it might do without considerable danger to itself — without considerable danger from infrugality and peculation: out of two small garrisons, the number of official situations being determinate, no great pickings could be made.

But, in case of aggression from any distant power, how would the fortifications be to be defended? By *land*, indeed, under a government such as here proposed, the assistance of the inhabitants of the territory might be trusted to as a sufficient defence. But by *sea*, a source of defence suited to the nature of that element would be necessary: and, for this defence, not only the *navy* of *Washingtonia* on the spot, but the mere *name* of it, would be sufficient. Under the assurance that making war upon *Junctiana*, would be making war upon *Washingtonia*, of no such war does there seem any the smallest danger at the hands of any other states. To destroy the communication, would be to put an end to their own use of it: to injure it, would be to injure themselves, were it in any other view than the putting themselves in possession of it. By putting themselves in *possession* of it, they could do themselves no service, any further than they could *keep it*. Keep it they might, if a navy alone would suffice to keep it. But this they could not do: no such thing could any one of them do without an army likewise: an army, and *that* sufficient to maintain itself against the three powers perpetually confederated in the defence of the object of a conquest so obviously untenable.

§ 8. *Anglo-American United States, — their inducements for granting the protection requisite.*

I. As to the guarantee looked for at their hands.

The purpose for which the concurrence of the long-established American Republic is regarded as necessary, has been already stated, — the affording to capitalists a sufficient assurance that the source of their profit will not be dried up — dried up, either by hostility from without, or by misconduct in any shape within.

The shapes in which eventual assistance is looked for at her hands, have also been already brought to view: —

1. First of the two mischiefs against which the guarantee is looked for: Hostility on the part of any maritime power — hostility directed to the purpose of destroying, injuring, or seizing and keeping, the line of communication: eventual assistance looked for, that of her naval force.

If, of the engagement for such eventual assistance, any actual addition to expense were a necessary consequence, here would be a burthen — a burthen to set in account against the accompanying benefit. But for any such expense, no probable need, it is believed, can be pointed out. For *general purposes*, a naval force, to a certain amount, she keeps up already, and will at all times keep up. The *sight* of this force, ready at all times to be called for and brought into action, should the conjuncture in question — the *casus fœderis*, as it is called by publicists — ever come into existence, will, in all human probability, be at all times sufficient for the purpose: to prevent its ever being called for, its universally known readiness to come whenever called for, will suffice.

2. Second of the two mischiefs against which the guarantee is looked for: Misconduct on the part of the population of *Junctiana;* misconduct, whether in the general shapes of misrule or anarchy, or in the particular shape of injustice towards the *company*, depriving them of the possessions stipulated for by them, in return for the expense to which this same population will, the greatest part of it, have been indebted for its existence.

The Junctiana territory being, by the supposition, a member of the United States; namely, in the first instance, upon the footing of their other dependent territories, and, as soon as ripe, upon the equal footing of an independent confederate; the following are rights, for the enjoyment of which the expectation of a guarantee on the part of the union will scarcely present itself as unreasonable: understand a guarantee, not only against all other nations, but against the Mexican and Columbian nations themselves, their consent to it being included in the agreement: —

1. Right of exacting the price of transit — so it be for ever without enhancement, unless it be in certain stipulated cases; 2. Right of receiving the rents and profits of whatever lands the company is proprietor of, as in the case of any other proprietors. Under these two heads is comprised everything that seems necessary.

II. As to their *inducements* for the affording this same guarantee.

To the entering into the engagement thus defined, refusal, or even reluctance, on the part of the United States in question, does not seem much to be apprehended.

By the supposition, the infant state would from the first be a member of their confederacy: in the first instance, and so long as in their judgment should be necessary, in a state of pupillage and probation — on the footing of what they call *a territory* — a territory nursed in the manner in which they are so well accustomed, and with such conspicuous success, to nurse infant states. Now, then, comes the question of their own skill in this most useful, most noble of all arts. In this instance any more than in any former one, can any dis-

trust on their part reasonably be expected to have existence?—distrust of their own skill, and after so many conclusive evidences of it as have been afforded by experience?

If indeed to such guarantee as that in question, any considerable danger were attached of their being engaged in war, here would be a contingent evil, to be set in the balance against the certain good. But, of any such war, the utter improbability has (it is hoped) been rendered sufficiently manifest. See the last preceding Section.

Without adequate prospect of benefit to their principals, duty and interest would concur in preventing these constantly and necessarily faithful trustees from taking any such part in the affairs of others. But of such benefit can there be any deficiency?

1. In the first place, on the supposition that, from the communication in question, benefit to *any* amount will be derived, of all the nations of the earth, will not they reap the greatest share of it? Already their commercial navy is not greatly inferior to that of England — to that of every other country it is decidedly superior. Erelong, in the natural course of things, it cannot fail of being superior even to that of England: and, whatever be the number of her vessels that will find a convenience in availing themselves of the communication, the convenience to each such American vessel will, in proportion to its greater vicinity to the spot, be rendered greater than it can be to any European one.

2. As to the *particular* benefit, from the so much speedier communication with the settlement or settlements, present, future, and contingent, in the Pacific, — on this subject enough has been already said.

True it is, that for the *representatives of Junctiana*, when they come to sit in congress, *distance* from the nearest part of the present territory of the United States will give an additional sea voyage of some days. But, upon the whole, would the length of time occupied by the conveyance be in any considerable degree greater than that which is at present occupied by the state most distant from the seat of government? And, whatever it be, what, if any, will be the amount of the practical inconvenience? At the utmost, it may operate as a slight deduction from the value of the benefit, but cannot assuredly ever operate as a bar to it.

Another acquisition, which, though not of quite so substantial a nature as either of the preceding ones, does not seem much in danger of finding the nation in question altogether insensible to its value, is that political gem called *glory*: glory—not of that bloody hue which, it is hoped, is growing more and more out of fashion, and will one day be as little in repute as spangles and embroidery upon a coat at present, but glory of the very purest water — the glory radiating from the uncontrovertible proof that will thus be given, of its having been looked up to as the nation which, in the opinion of two other free nations, stands highest in the composite scale of national probity, wisdom, and benevolence. Stands highest? or should it not rather have been said, is the *only* nation, in the government of which, any such union of virtues could, in the nature of things, have ever yet found place?

§ 9. *All other Nations, — their inducements to acquiescence.*

From the proposed communication, formed upon the proposed plan, all other nations have more or less to gain, nothing to lose. Whatever may be the gain, it will, in the instance of each such nation, be at the risk of others, without risk in any shape to itself.

That which they will gain by this means, they could not, any of them, gain by any other means.

A PROTEST AGAINST LAW-TAXES,

SHOWING THE

PECULIAR MISCHIEVOUSNESS OF ALL SUCH IMPOSITIONS AS ADD TO THE EXPENSE OF APPEAL TO JUSTICE.

BY

JEREMY BENTHAM.

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TAXES on law-proceedings constitute in many, and perhaps in all nations, a part of the resources of the state. They do so in Great Britain — they do so in Ireland. In Great Britain, an extension of them is to be found among the latest productions of the budget — in Ireland, a further extension of them is among the measures of the day. It is this impending extension that calls forth the publication of the present sheets, the substance of which has lain upon the shelf these many years.

It is a well-known parliamentary saying, that he who reprobates a tax ought to have a better in his hand.* A juster condition never was imposed. I fulfil it at the first word. My better tax is —— any other that can be named.

The people, when considered with a view to the manner in which they are affected by a tax of this description, may be distinguished into two classes: those who in each instance of requisition have wherewithal to pay, and those who have not: to the former, we shall find it more grievous than any other kind of tax, to the latter a still more cruel grievance.

Taxes on consumption cannot fall but where there is some fund to pay them: of poll taxes, and taxes on unproductive property, the great imperfection is, that they may chance to bear where such ability may be wanting. Taxes upon law-proceedings fall upon a man just at the time when the likelihood of his wanting that ability is at the utmost. When a man sees more or less of his property unjustly withholden from him, then is the time taken to call upon him for an extraordinary contribution. When the back of the innocent has been worn raw by the yoke of the oppressor, then is the time which the appointed guardians of innocence have thus pitched upon for loading him with an extraordinary burthen.† Most taxes are, as all taxes ought to be, taxes upon affluence — it is the characteristic property of this to be a *tax upon distress.*

A tax on bread, though a tax on consumption, would hardly be reckoned a good tax; bread being reckoned in most countries where it is used, among the necessaries of life. A tax on bread, however, would not be near so bad a tax as one on law-proceedings: a man who pays to a tax on bread, may, indeed, by reason of such payment, be unable to get so much bread as he wants, but he will always get some bread, and in proportion as he pays more and more to the tax, he will get more and more bread. Of a tax upon justice, the effect may be, that after he has paid the tax, he may, without getting justice by the payment, lose bread by it: bread, the whole quantity on which he depended for the subsistence of himself and his family for the season, may, as well as anything else, be the very thing for which he is obliged to apply to justice. Were a three-penny stamp to be put upon every three-penny loaf, a man who had but three-pence to spend in bread, could no longer indeed get a three-penny loaf, but an obliging baker could cut him out the half of one. A tax on justice admits of no such retrenchment. The most obliging stationer could not cut a man out half a *latitat* nor half a *declaration.* Half justice, where it is to be had, is better than no justice: but without buying the whole weight of paper, there is no getting a grain of justice.

* It confines itself of course to public men, or what comes to the same thing, private men speaking in the character of public. As for individuals aggrieved, they have performed their part when they have stated their own grievance.

† Even in the instance of a defendant, or when the wrong is not pecuniary, the hardship of a double yoke does not cease: for the natural expense of litigation is a burden which this artificial one finds pressing on him in any case.

A tax on necessaries is a tax on this or that article, of the commodities which happen to be numbered among necessaries: a tax on justice is a tax on all necessaries put together. A tax on a necessary of life can only lessen a man's share of that particular sort of article: a tax on justice may deprive a man, and that in any proportion, of all sorts of necessaries.

This is not yet the worst. It is not only a burthen that comes in the train of distress, but a burthen against which no provision can be made.

All other taxes may be either foreseen as to the time, or at any rate provided for, where general ability is not wanting: in the instance of this tax, it is impossible to foresee the moment of exaction—it is equally impossible to provide a fund for it. A tax to be paid upon the loss of a husband, or of a father on whose industry the family depended —a tax upon those who have suffered by fire or inundation, would seem hard, and I know not that in fact any such modes of taxation have ever been made choice of: but a tax on law-proceedings is harder than any of these. Against all those misfortunes, provision may be made; it is actually made in different ways by insurance: and, were a tax added to them, pay so much more, and you might insure yourself against the tax. Against the misfortune of being called upon to institute or defend one's self against a suit at law, there neither is nor can be, any *office of insurance.**

Such is the cruelty of this species of tax, to those who have wherewithal to pay, and do pay to it accordingly. To those who do not, it is much more cruel: it is neither more nor less than *a denial of justice.*

Justice is the security which the law provides us with, or professes to provide us with, for everything we value, or ought to value—for property, for liberty, for honour, and for life. It is that possession which is worth all others put together: for it includes all others. A denial of justice is the very quintessence of injury, the sum and substance of all sorts of injuries. It is not robbery only, enslavement only, insult only, homicide only—it is robbery, enslavement, insult, homicide, all in one.

The statesman who contributes to put justice out of reach, the financier who comes into the house with a law-tax in his hand, is an accessary after the fact to every crime: every villain may hail him brother, every malefactor may boast of him as an accomplice. To apply this to intentions would be calumny and extravagance. But as far as consequences only are concerned, clear of criminal consciousness and bad motives, it is incontrovertible and naked truth.

Outlawry is the engine applied by the law, as an instrument of compulsion to those who fly from civil justice. Outlawry is the engine employed as an instrument of punishment against the most atrocious of malefactors. This self-same load of mischief, the financier, with perfect heedlessness, but with unerring certainty, heaps on the head of unsuspected innocence. Besides outlawry, which, in the cases where the offender could not otherwise be affected, comes in as subsidiary in lieu of other punishment, there are certain offences for which a man is subjected, expressly and in the first instance, to a similar punishment, under the name of *forfeiture of the protection of the law.* The same fate attends a man thus at different periods, according to his merits. If guilty, it lays hold of him after conviction, for a particular cause, and without excluding the hope of pardon: if innocent, and poor, and injured, before conviction, and without conviction, and for no cause at all, and as long as he continues poor, that is, as long as he lives.

What a contrast! What inconsistency! The judge and the legislator deliberating with all gravity, each in his separate sphere, whether to inflict or not this heavy punishment on this or that guilty individual, or narrow description of guilty individuals. The legislator, on the other hand, merely to get a little money which he could better get from any other source whatever, heaping the same doom upon thousands, not to say millions, of innocent and injured subjects, without consideration or remorse.

Mark well, that of all sorts of men, it is the poor, and they the more certainly in proportion to their poverty, that are despoiled in this way of the protection of the law: the protection of the law, that inestimable jewel, which in the language of that very law is defined the citizen's universal and best birthright: the poor, and him that has none to help him, these are they to whom the help of the law is thus unfeelingly refused. The rich, were it from them that this great safeguard were withholden, have shields of their own to

* I say there never can be: in those other instances the event insured against is always some very simple event,—such as the death of a person,—which in the ordinary course of things is not open to dispute. Here the incident which calls for contribution, is not only disputable, but by the supposition is actually in dispute. Nothing less than litigation can ascertain legally, whether litigation has been necessary. Have you engaged with a man for his paying you a sum of money whenever it shall become necessary for you to institute or defend yourself against a lawsuit?—wait till the suit is at an end, and you will know whether he ought to pay you. A society indeed, and a very laudable one, has been established for purposes which come under this head: but the relief it affords is confined not only to criminal cases, but to a certain description of criminal cases; nor could it be rendered anything like coextensive with the grievance.

ward off the attacks of injury: the natural influence of wealth, the influence of situation, the power of connexion, the advantages of education and intelligence, which go hand in hand with wealth. The poor has but one strong-hold, the protection of the law: and out of this the financier drives him, without vouchsafing him a thought, in company with the herd of malefactors.

The poor, on account of the ignorance and intellectual incapacity inseparably attached to poverty, are debarred generally — as perhaps it is necessary, were it only for their own sake, they should be universally—from the sweets of political power: but are not so many unavoidable inequalities enough, without being added to by unnecessary injustice?

Such is the description of those from whom this sum total of all rights is torn away with one hand, while tendered with the other: what are their numbers in proportion to the sum total of subjects? I fear to say — perhaps two-thirds, perhaps four-fifths, perhaps nine-tenths; but at the lowest computation a vast majority.*

A third description of persons may yet be distinguished, whose condition under the system of law-taxes is still more deplorable than that of either of the other two. I mean those who, having wherewithal to pay the imposition at the commencement of the suit, and during more or less of its progress, see their substance swallowed up by the taxes before the termination of it. The two preceding modifications of abuse, either of them bad enough, are thus put together, and compounded into a third.

Considered with a view to the treatment given to persons of this description, a court of justice is converted into exactly the same sort of place, as the shop of a baker would be, who having ranged his loaves along his window in goodly show to invite customers, should, instead of selling them the bread they asked for, first rob them of their money, and then turn them out of doors. To an unprejudiced imagination, the alliance between justice and finance, presents on this occasion a picture almost too near the truth to be termed an apologue. At the door of a house more predatory than any of those that are called houses of ill fame, the *judge* in his robes presenting to unsuspecting passengers a belt to prick in; the *Lord High Treasurer* in the back ground with his staff, lying in wait, ready as soon as the victims are fairly housed, and the money on the table, to knock them down and run away with it. The difference is, that any man may choose whether he will prick in the belt of the unlicensed sharper, nor are any but the rawest louts to be so deluded: whereas the wisest men may be inveigled in, as well as the stoutest dragged in, by the exalted and commissioned plunderers —— so much surer is their game. For were the list of law-taxes ever so familiar, and ever so easy to be understood, it is impossible for a man to know beforehand whether he has wherewithal to pay the bill, because it is impossible for him to know what incidents may intervene to lengthen it. Were a man even to sit down and form a resolution to submit to every injury which he could not afford to prosecute for, and to plead guilty to every accusation which he could not afford to defend himself against, even at this price he could not save himself from the hardship of paying for justice, aggravated by the still greater hardship of not getting it.

If in all cases the practice is wicked, in some it is more particularly preposterous. In civil causes, and other causes where the injury to individuals affords a natural interest to prosecute, artificial expenses are cruelty and breach of faith: in a large class of penal causes, in which, for want of such natural interest, prosecutors must be engaged by factitious inducements, or the law be a dead letter, the cruelty and treachery are crowned by blunder and inconsistency. Beckoned into court with one hand, men are driven away with the other. But, costly as the attractive power frequently is, the repulsive force is apt to be much stronger. Reward is subsequent, distant, uncertain, and dependent upon success. Trouble, expense, and odium, are certain and precedent.†

* In England, the expense of carrying through a common action, cannot be less than about £24 at the lowest rate, on the plaintiff's side alone, [See Schieffer on Costs, 1792.] The average expense of civil suits of all sorts, taking equity causes into the account, can surely not be rated at less than double that amount, on that one side. The average expenditure of an English subject, infants and adults, rich as well as poor, taken together, has been computed by Davenant (as quoted on this occasion somewhere by Adam Smith) at £8 a-year. Six years' income then is what a man must have in advance, before he can be admitted to take his chance for justice. Of many estimates which Dr. Anderson had met with, £20 was the highest, and he takes but ten pounds. [Interest of Great Britain with regard to her colonies, London, 1792.] No man then, we may say at any rate, can have the benefit of justice, in the ordinary way, either in making good a just claim, or saving himself from an unjust one, who cannot find, for this purpose alone, a sum equal to several years of a man's income. From this statement it needs not much study to perceive, that for the bulk of the community, as far as ordinary cases of the civil kind are concerned, *justice* is but an empty name.

+ This species of tax would stand absolutely alone in point of depravity, were it not for the tax on drugs, as far as it extends to those used in medicine. This, as being also a tax upon distress, is so far in specie the same, but is nothing to it in degree. To recover a shilling in the way of justice, it will cost you at least £24, of which

In favour of this species of imposition, I have seen two arguments produced.

One is, that in this case as in others, the burthen of an establishment ought to lie on those by whom the benefit is reaped. The principle is incontrovertible: the matter of fact supposed by the application of it is not true.

The argument, were it just, would not extend beyond so much of the produce of the tax as is requisite for defraying the charge of this part of the national establishment. Whether it be confined or no within these bounds, was perhaps never thought worth inquiring into, in any country where this tax was imposed. It certainly extends much beyond them in England; and it seems to be resorted to from time to time, with as little scruple, as an extension of the customs or excise. But let this pass.

As to the notion of a connexity in this case betwixt the benefit and the burthen, it has been countenanced by an authority too respectable, not to deserve the most serious notice;* but come it from whom it will, it is a mere illusion. The persons on whom the whole of the burthen is cast, are precisely those who have the least enjoyment of the benefit: the security which other people enjoy for nothing, without interruption, and every moment of their lives, they who are so unfortunate as to be obliged to go to law for it, are forced to purchase at an expense of time and trouble, in addition to what pecuniary expense may be naturally unavoidable. Meantime, which is of most value? — which most worth paying for? — a possession thus cruelly disturbed, or the same possession free from all disturbance? So far then from being made thus wantonly to pay an extra price, a man who stands in this unfortunate predicament, ought rather to receive an indemnification at the public expense for his time and trouble; and the danger of insidious or collusive contests, in the view of obtaining such an indemnity, is the only objection I can see, though perhaps a conclusive one, against the granting it.

Litigation may in this point of view be compared to war in sober sadness, as war has been to litigation in the way of pleasantry. The suitor is the forlorn hope in this forensic warfare. To throw upon the suitor the expense of administering justice, in addition to the trouble and the risk of suing for it, is as if, in case of an invasion, you were to take the inhabitants of the frontier and force them not only to serve for nothing, but to defray of themselves the whole expenditure of the war.

What in our times is become inveterate practice, is stigmatized as a species of iniquity without a precedent, by Saint Paul. "*Who is there,*" demands the Apostle, "*who is there that ever goes to war at his own charge?*" — "*Alas!*" cries the poor suitor, "*I do.*"

The other argument in favour of a set of taxes of this kind, is, that they are a *check to litigation.*

Litigation is a term not altogether free from ambiguity. It is used sometimes in a *neutral* sense, to denote the prosecuting or defending a suit, though perhaps more frequently in a bad one. In its neutral sense, it expresses the irreproachable exercise of an essential right: in a bad sense, a species of misconduct practised under the notion of exercising such a right.

In the first sense, taxes can never have been recommended by any man as a check to litigation: in this sense, an avowed desire of checking litigation would be neither more nor less than an avowed desire of denying justice.

In a bad sense again, the word is used on two different occasions; where the suit, whatever be the importance of the matter in dispute, is on the part of the person spoken of as maintaining it, a *groundless* one. and where the suit, however well-grounded on his part in point of title, is on account of the supposed unimportance of the matter in dispute, deemed a *frivolous*, a *trifling*, a *trivial* one; and in either case, it is of course applicable to the situation of either plaintiff or defendant, though it is apt to fix in the first instance, and most readily upon the situation of the plaintiff, as being the party, who, by taking the first step on the commencement of the suit, exhibits himself as the author of it.

On either side, litigation, when *groundless*, may be accompanied or not, with what the lawyers call *in genere malitia*, meaning *consciousness of misdoing*, and in this particular case *mala fides*, consciousness of the groundlessness of the action or defence — consciousness of the *want of merits.*

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a good part in taxes: but to be admitted to buy a shilling's worth of medicine for a shilling, it does not cost you threepence. Hospitals for the sick are not uncommon: there are none for harassed and impoverished suitors. There are *Lady Bountifuls* that relieve the sick from the tax on medicines, and the price of them into the bargain: but a *Lady Bountiful* must be bountiful indeed, to take the place of attorney and counsel, as well as of physician and apothecary, and supply a poor man with as many pounds worth of *latitats* and *pleas*, as he must have to recover a shilling. A man cannot, as we have seen, insure himself against lawsuits: but a man may insure himself, and many thousands actually do insure themselves against sickness. But these reliefs are neither certain nor general: and after all, a tax on him who has had a leg or an arm broken, a tax on him who has had a fit of the ague, gout, rheumatism, or stone, will be the worst possible species of tax, next to a tax on justice.

N. B. The tax on quack medicines, that is, on unknown and unapproved medicines, leaving all known and approved ones untouched, falls in a less degree, if at all, under this censure.

* Dr. Adam Smith, Wealth of Nations.

Where merits are wanting, but there exists no consciousness of the want, taxes on law-proceedings do, it must be confessed, operate as a check to litigation; and that as well on the side where it is groundless as on that where it is well-grounded, and in the same degree. Indeed, as both of two contending parties cannot in point of law be actually in the right, though either or both may think themselves so, the impediment cannot operate to the denial of justice, but it must operate to the prevention of groundless litigation at the same time. Prevent him who is in the right from instituting a suit, you prevent him who is in the wrong from defending one. But neither is litigation prevented, any further than as justice is denied. So far then as this case extends, it is still but the other side of the same effect, the *denial of justice*.

Have they then any peculiar tendency to operate as a check to litigation, when it is not only groundless, but accompanied with a consciousness of its being so?—to *malicious*, or as it might with more propriety be termed, *anti-conscientious* litigation? On the contrary, their direct tendency and sure effect is to promote it.

They produce it on the part of the *plaintiff*. —Were proceedings at law attended with no expense nor other inconvenience, till the suit were heard and at an end, a plaintiff who had no merits, could do a defendant man no harm by suing him: he could give him no motive for submitting to an unfounded claim; malice would have no weapons; oppression would have no instrument. When proceedings are attended with expense, the heavier that expense, the greater of course is the mischief which a man who has no merits is enabled to do; the sharper the weapon thus put into the hand of malice, the more coercive the instrument put into the hand of the oppressor.

They produce it on the part of the *defendant*. Were proceedings at law attended with no expense, a defendant who knew he had no merits, a defendant who was conscious that the demand upon him was a just one, would be deprived of what is in some cases his best chance for eluding justice, in others the absolute certainty of so doing; he would lose the strongest incentive he has to make the attempt. A defendant who means not to do justice unless compelled, and who knows that the plaintiff cannot compel him without having advanced a certain sum; such a defendant, if he thinks his adversary cannot raise that sum, will persevere in refusal till a suit is commenced, and in litigation afterwards.

Whether they make the litigation, or whether they find it ready made, they show most favour to the side on which anti-conscientious litigation is most likely to be found. By attaching on the commencement of the suit, they bear hardest upon the plaintiff, or him who, if they would have suffered him, would have become plaintiff. In so doing they favour in the same degree the defendant, or him who, if the party conceiving himself injured, could have got a hearing, would have been called upon to defend himself. But it is on the defendant's side that anti-conscientious practice is most likely to be found. Setting expense out of the question, an evil of which these laws are thus far the sole cause—setting out of the question the imperfections of the judicial system, and the hope of seeing evidence perish, or the guilty view of fabricating it, a man will find no motive for instituting a suit for an ordinary pecuniary demand, without believing himself to be in the right; for if he is in the wrong, disappointment, waste of time, fruitless trouble, and so much expense as is naturally unavoidable, are, by the supposition, what he knows must be his fate. Whereas, on the other hand, a man upon whom a demand of that kind is made, may, although he knows himself to be in the wrong, find inducement enough to stand a suit from a thousand other considerations; from the hope of a deficiency in point of evidence on the part of the plaintiff, not to mention, as before, the rare and criminal enterprise of fabricating evidence on his own part,—from the hope of tiring the plaintiff out, or taking advantage of casual incidents, such as the death of witnesses or parties,—from the temporary difficulty or inconvenience of satisfying the demand, or (to conclude with the case which the weakness of human nature renders by far the most frequent) from the mere unwillingness to satisfy it.

In a word, they give a partial advantage to conscious guilt, on whichever side it is found; and that advantage is most partial to the defendant's side, on which side consciousness of guilt, as we see, is most likely to be found.

Better, says a law maxim subscribed to by everybody, better that *ten* criminals should escape, than one innocent person should suffer; and this in case even of the deepest guilt. For *ten*, some read a *hundred*, some a *thousand*. Whichever reading be the best, an expedient of procedure, the effect of which were to cause ten innocent persons to suffer for every ten guilty ones, would be acknowledged to be no very eligible ingredient in the system. What shall we say of an institution, which for one culpable person whom it causes to suffer, involves in equal suffering perhaps ten blameless ones.

Thus much for *groundless* suits: there remains the plea of its tendency to check what are deemed *trivial* suits.

I know what a *groundless* suit means—I know of no such thing as a *frivolous* one. No wrong that I know of can be a trivial one, which to him to whom it is done appears

a serious one, serious to such a degree, as to make it worth his while to demand redress at the hand of justice. Conduct is the test of feeling. I know of no right I have to set up any feelings of my own as the standard of those of my neighbour, in contradiction to a declaration of his, the truth of which is evidenced by his own conduct. What to one man again is trivial, to another man may be of high importance. In the account of wrong too must be included, not only the individual wrong taken by itself, but its effects in the way of encouragement to repetition, and its effects in the way of example. I know of no wrong so slight, that by multiplication may not become intolerable. Give me but a licence to do to any person at pleasure the minutest wrong conceivable; — I need no more, that person is my slave. Allow me to rob him, though it be but of a farthing, farthing by farthing, I will find the bottom of his purse. Allow me but to let fall a drop of water upon his head — *gutta cavat lapidem*, the power of striking his head off would be less susceptible of abuse.

In pecuniary cases, the smaller the sum in dispute, the less reserve is used in branding the conduct of the parties with the charge of litigation, of which, in such cases the reproach is apt to fall principally, if not exclusively, to the plaintiff's share. But the importance of the sum is altogether governed by the circumstances of the parties; the amount of it in pounds, shillings, and pence, shows nothing. One man's income may be a hundred, a thousand, four thousand times as great as that of another. In England there are men whose income exceeds £60,000 a-year. Fifteen pounds a-year is as much as falls to the lot of perhaps the greater number of the whole body of the people. Without a particular caution, a legislator or a judge will naturally enough, like any other man, take the relation of the sum in dispute to his own feelings, that is, its ratio to his own circumstances, for the measure of importance; but by this standard he will be sure to be deceived, as often as the circumstances of the parties, or either of them, are materially different from his own. Fifty pound, for example, will be apt to appear in his eyes an object of considerable importance; an object of which a tenth or a twentieth part, or less, might be of importance sufficient to justify from the charge of litigation, the maintenance of a suit. A shilling would be almost sure to appear to him an object altogether trifling; an object by no means of magnitude enough to warrant the maintenance of a suit. Fifty pound is, however, a sum of less importance to a Duke of Marlborough or Bedford, than a single shilling (viz. than a thousandth part of £50) to many a man, in truth to probably the majority of men in the kingdom. It is therefore more unjust, more tyrannical, to refuse to hear the demand of an ordinary working man to the amount of a shilling, than it would be to refuse to hear the demand of a Duke of Marlborough or Bedford, to the amount of £50. The legislator who, on the plea of checking litigation, or on any other plea, exacts of a working man as a preliminary to his obtaining justice, what that working man is unable to pay, does refuse to him a hearing, — does, in a word, refuse him justice, and that as effectually and completely as it is possible to refuse it.

That all men should have *equal rights*, not only would be politically pernicious, but is naturally impossible: but I hope this will not be said of *equal justice*.

Trivial causes require no such factitious checks: to such causes were all expenses struck off that can be struck off, there are natural checks in abundance, that are unavoidable. There is the pain of disappointment: there is expense, of which a certain measure will every now and then be absolutely unavoidable: there is consumption of time, which to the working classes, that is to the great majority of the people, is expense.

But even let the cause be trivial, and that to such a degree as to render the act of commencing the litigation blameable, the blame is never so great on the side of the party most favoured by the tax, as on the side of the party most oppressed by it. The party most oppressed is the complainant—the party who, having suffered the injury, such as it is, claims or would claim satisfaction for it at the hands of justice. But, so as there does but exist the smallest particle of an injury, the party who claims satisfaction for it can never be so much in the wrong for doing so, but that he who refuses satisfaction must be still more so. If the demand be just, why did not he comply with it? If just, but trifling, why does he contest it? In this case then you cannot punish in this way the misconduct of one party, without rewarding the still greater misconduct of the other. If the tax applies a check where there is blame, it affords protection and encouragement where there is still greater blame.

Another injustice. — The poorer a man is, the more exposed he is to the oppression of which this supposed remedy against litigation is the instrument. But the poorer a man is, the less likely he is to be litigious. The less time a man has to spare, and the less a man can afford to expend his time (not to speak of money) without being paid for it, the less likely is he to expose himself to such a consumption of his time.

The rich man, the man who has time and money at command, he surely, if any, is the man to consume it litigiously and frivolously. No wonder however, if to a superficial glance, the poor should appear more litigious than he.

There are more of the poor than of the rich: and to the eye of unreflecting opulence, the causes of the poor are all trivial ones.

We think of the poor in the way of charity, for to deal out charity gratifies not only benevolence, but pride. We think much of them in the way of charity, but we think little of them in the way of justice. Justice, however, ranks before charity; and they would need less charity, if they had more justice.

What contributes more than anything to the indignation excited by suits that are deemed trivial, and, on account of the triviality *vexatious*, is the excessive ratio of the expense of the suit to the value of the matter in dispute: especially when the matter in dispute being pecuniary, its minuteness is more conspicuous and defined. But to what is this expensiveness owing? As far at least as these taxes are in question, to the legislator himself. Mark then the iniquity: — he is himself the author of the wrong, and he punishes for it the innocent and the injured.

To exclude the poor from *justice* was not enough: — they must be excluded also from *mercy*. Forty shillings is the tax imposed on pardons, by a statute of King William (5 & 6 W. & M. c. 21. § 3.) forty shillings more by another, not five years afterwards, (9 & 10 W. III. c. 25. § 3, 50.) Together, £4: — half a year's income of a British subject, according to Davenant's computation above quoted. What is called *mercy*, let it be remembered, is in many cases, no more than *justice*: in all cases where the ground of pardon is the persuasion of innocence, entertained either notwithstanding the verdict, or in consequence of evidence brought to light after the verdict.* All punishments are accordingly irremissible, to him who has not to the amount of half a year's income in store or credit — all fines to that amount or under, absolutely irremissible.†

Taxes on law-proceedings, so far then from being a check to litigation, are an encouragement to it — an encouragement to it in every sense in which it is mischievous and blameable. Would you really check litigation, and check it on both sides? — the simple course would be a sure one. When men are in earnest about preventing misconduct in any line, they annex punishment to misconduct in that line, and to that only: a species of misconduct which cannot be practised but as it were under the eye of the court, is of all others the easiest to cope with in the way of law. Deal with misconduct that displays itself under the eye of the court as you deal by delinquency at large, and you may be sure of succeeding to a still superior degree. Discriminate misconduct then from innocence: lay the burthen on misconduct and misconduct only, leaving innocence unoppressed. Keep back punishment, till guilt is ascertained. Keep back costs, as much as possible, till the last stage of procedure; keep off from both parties everything of expense that is not absolutely unavoidable, where litigation is on both sides without blame: at that last stage if there be found blame, throw whatever expense of which you allow the necessity to subsist beyond what is absolutely unavoidable, — throw it on that side, and on that side only, where there has been blame. If on both, then if circumstances require, punish it on both sides, by fine for instance, to the profit of the public.

Litigation, though eventually it prove groundless — litigation, like any other course of conduct of which mischief is the result, is not therefore blameable; and where it is blameable, there is a wide difference whether it is accompanied with temerity only, or with consciousness of its own injustice. The countenance shown to the parties by the law ought to be governed, and governed uniformly and proportionally, by these important differences. — So much in point of utility — how stands establishment? — Taxes heaped on in all stages from the first to the last without distinction: — all costs given or no costs, no medium: — costs scarce ever complete, and nothing beyond costs. No mitigation, or enhancement, in consideration of pecuniary circumstances. No shades of punishment in this way correspondent to shades of blame — in most cases no difference so much as between consciousness of injustice and simple temerity, nor so much as betwixt either and innocence. The power of adjudging as between costs and no costs, seldom discretionary: — that of apportioning, never: — nor that of fining beyond the amount of costs: — consequently nor that of punishing both parties where both have been to blame. Were a power to be given by statute to impose on a litigious suitor convicted of litigation, a fine to an amount not exceeding what the losing party pays now, whether he be blameable or blameless, it would be cried out against perhaps as a great power, too great to be given to judges without juries.‡

* For instance the case of Mr. Atkinson.

† It would be curious enough to know what profit the Treasury may have drawn from that time to the present, from so extraordinary a fund: certainly, not enough to pay the salary of one of the Lords Commissioners: probably not enough to pay that of his valet-de-chambre.

These are busy statutes. By the prohibition and sale of justice, they run counter to Magna Charta: — by the prohibition of mercy, they break the coronation oath. [By 53 Geo. III. c. 29, (23d May, 1813), the expenses connected with pardons are no longer to be paid by the persons pardoned, but by the Treasury. — *Ed.*]

‡ The distinction between temerity and consciousness of blame, a distinction pervading human nature, and applicable to every species of

Justice shall be denied to no man, justice shall be sold to no man, says the first of statutes, *Magna Charta*. How is it under these later ones? — Denied, as we have seen, to nine-tenths of the people, sold to the other tenth at an unconscionable price. It was a conceit among the old lawyers, reported if not adopted by Lord Coke, that a statute made contrary to *Magna Charta*, though made in all the forms, would be a void law. God forbid, that by all the lawyers in the world, or for the purpose of any argument, I should ever suffer myself to be betrayed into any such extravagance: in a subject it would be sedition, in a judge it would be usurpation, in anybody it would be nonsense. But after all it must be acknowledged, to be in some degree unfortunate, as well as altogether singular, that, of an instrument deemed the foundation of all liberty, and magnified as such even still, to a degree of fanaticism, a passage by far the most important, and almost the only one that has any application now-a-days, should be thus habitually trodden under foot, without remorse or reclamation.*

A tax so impolitic and so grievous — a tax thus demonstrated to be the worst of taxes, how comes it ever to have been made choice of, and when made choice of, acquiesced in? These are not questions of mere curiosity: for acquiescence under a tax, and that so general, forms at first glance no inconsiderable presumption in its favour. A presumption it does form: but when demonstration has shown itself, presumptions are at an end.

How comes the tax to have been made choice of? One cause we have seen already in another shape; the unscrutinized notion of its supposed tendency to check *litigation*: litigation which, where it stands for mischief, is the very mischief which the species of tax in question contributes with all its power to promote.

Another cause may possibly be, the tendency which this sort of tax has to be confounded in the eye of an incurious observer, with other sorts, which are either the best of all, or next to the best. The best of all are taxes on consumption, because not only do they fall nowhere without finding some ability to pay them; but where necessaries are out of the question, they fall on nobody who has not the option of not paying them if he does not choose it. Taxes on property, and those on transfer of property, such as those on contracts relative to property, are the next best: because though they are not optional like the former, they may be so selected as never to call for money but where there is ability, nay even ample ability, to pay them. Now, of these two most supportable classes of taxes, the second are all of them levied by means of *stamps*: taxes on consumption, too, in many instances, such as those on cards, dice, gloves, and perfumery, show to the eye as stamp-duties. But all these are very good taxes. Stamp-duties therefore are good taxes: and taxes on justice are all stamp-duties. Thinking men look to consequences; they look to the feelings of the individuals affected: acting men look to the stamp: taxes on justice, taxes on property, taxes on consumption, are accordingly one and the same object to the optics of finance. Stamp-duties too have another most convenient property: they execute themselves, and law-taxes beyond all others: in short, they exclude all smuggling.† They heap distress indeed upon distress; but the distress is not worth minding, as there is no escaping it.

But the great cause of all is the prospect

misbehaviour, is scarce so much as known to the English law. There are scarce words for it in the language. *Temerity* is taken from the Roman law. *Malice*, the term by which English lawyers seem in some instances to have had in view the expressing consciousness of blame, presents a wrong idea, since in common language it implies *hatred*, an affection which in many instances of conscious guilt, may be altogether wanting: — instance, offences of mere rapacity, such as theft, robbery, and homicide for lucre.

The legislator? — he talk of vexation? — He does everything to create the evil, he does nothing to remove it.

I happened once to fall into conversation with a man, who, from an attorney had been made judge of one of the provinces in America. Justice, I understood from him, was on a very bad footing there: it might be had almost for nothing: the people were very litigious: he found them very troublesome. A summons cost — I forget whether it was three-and-sixpence or half-a-crown. Whom the half-crown went to I do not know: one may be pretty certain not to the judge. — Seeing no prospect of our agreeing, I did not push the conversation far. The half-crown seemed to him too little: to me it seemed all too much. The pleasant thing would have been to have enjoyed the salary in peace and quietness, without being plagued with a parcel of low people. Justice would then have been upon the best footing possible. He had accordingly a project for checking litigation by raising the fees. I don't know whether it succeeded.

* Let us not for the purpose of any argument, give rise or countenance to injurious imputations. Though justice is partly denied, and partly sold, the difference is certainly immense, betwixt selling it for the personal benefit of the king or of a judge, and selling it for the benefit of the public — betwixt selling it by auction, and selling it at a fixed price — betwixt denying it for the sake of forcing the sale of it, or denying it to a few obnoxious individuals, and denying it indiscriminately to the great majority of the people. In point of moral guilt, there is certainly no comparison: but in point of political effect, it may not be altogether easy in every part, of the parallel, to say which mode of abuse s most extensively pernicious.

† Law paper might be forged: but the difficulty would be to issue it.

of acquiescence — a prospect first presented by hope, since realized over and over again by experience. It is too much to expect of a man of finance, that he should anticipate the feelings of unknown individuals: it is a great deal if he will listen to their cries. Taxes on consumption fall on bodies of men: the most inconsiderable one, when touched, will make the whole country ring again. The oppressed and ruined objects of the taxes on justice, weep in holes and corners, as rats die: no one voice finds any other to join with it.

A tax on shops, a tax on tobacco, falls upon a man, if at all, immediately, and presses on him constantly: — every man knows whether he keeps, or means to keep a shop — whether he means to sell or to use tobacco. A tax on justice falls upon a man only occasionally: it is like a thunder-stroke, which a man never looks for till he is destroyed by it. He does not know when it will fall on him, or whether it ever will: nor even whether, when it does fall, it will press upon *him* most, or upon his adversary. He knows not what it will amount to: he has no *data* from which to calculate it: it comes lumped to him in the general mass of law charges: a heap of items, among which no vulgar eye can ever hope to discriminate: an object on which investigation would be thrown away, as comprehension is impossible. Calamities that are not to be averted by thought, are little thought of, and it is best not to think of them. When is the time for complaint? Before the thunder-bolt is fallen it would be too soon — when fallen, it is too late. Shopkeepers, tobacconists, glovers, are compact bodies — they can arm counsel — they come in force to the House of Commons. Suitors for justice have no common cause, and scarce a common name — they are everybody and nobody—their business being everybody's is nobody's. Who are suitors? where are they? what does a Chancellor of the Exchequer care for them? what can they do to help him? what can they do to hurt him? So far from having a common interest, they have a repugnant interest: to crush the injured, is to befriend the injurer.

May not ignorance, with regard to the quantum and the source of the grievance, have contributed something to patience? Unable to pierce the veil of darkness that guards from vulgar eyes the avenues of justice, men know not how much of the difficulty of the approach is to be ascribed to art, and how much to nature. As the consumers of tobacco confound the tax on that commodity with the price, so those who borrow or would have wished to borrow the hand of justice, confound the artificial with the natural expense of hiring it. But if the whole of the grievance be natural, it may be all inevitable and incurable, and at any rate it may be no more the fault of lawyers or law-makers, than gout and stone are of physicians. Happy ignorance! if blindness to the cause of a malady could blunt the pain of it!

There want not apologists-general and talkers in the air, to prove to us that this, as well as everything else, is as it should be. The expense, the delay, and all the other grievances, which activity has heaped up, or negligence suffered to accumulate, are the prices which, according to Montesquieu, we must be content to pay for liberty and justice. A penny is the price men pay for a penny loaf: therefore why not twopence? and, if threepence, there would be no harm done, since the loaf would be worth so much the more.

May not a sort of instinctive fellow-feeling among the wealthy have contributed something, if not to the imposition, at least to the acquiescence? It is the wealthy alone, that either by fortune, situation, education, intelligence, or influence, are qualified to take the lead in legislation: and the characteristic property of this tax, is to be favourable to the wealthy, and that in proportion to their wealth. Other taxes afford a man no indemnification for the wealth they take from him: this gives him power in exchange. The power of keeping down those who are to be kept down, the power of doing wrong, and the more generous pride of abstaining from the wrong which it is in our power to do; advantages such as these, are too precious not to be grasped at with avidity by human weakness: and, as in a country of political liberty, and under a system of justice in other respects impartial, they can only be obtained by a blind and indirect route such as this, the inconvenience of travelling in it, finds on the part of those who are well equipped for it, the more patient an acquiescence.

Will it be said that abolishing the taxes on justice would not answer the purpose, for that supposing them all abolished, justice would still remain inaccessible to the body of the people?—This would be to justify one abuse by another. The other obstacles by which the avenues to justice have been blocked up, constitute a separate head of abuse, from which I gladly turn aside, as being foreign to the present purpose. Take off law taxes altogether, the number of those to whom justice will still remain inaccessible, would still, it must be confessed, be but too great. It would however not be so great, as it is at present under the pressure of those taxes. Though you could not tell exactly to how many you would open the doors of justice, you might be sure you opened them to some. Though you would still leave the burthen but too heavy, you would at any rate make it proportionably more supportable.

If by taking off these taxes, you reduced the expense of a common action from £25 to £20, you might open the door, suppose, to one in five of those against whom it is shut at present. Even this would be something: at any rate whatever were the remaining quantum of abuse, which you still suffered to subsist, you would have the consolation at least of not being actively instrumental in producing it. To reform *in toto* a system of procedure is a work of time and difficulty, and would require a rare union of legal knowledge with genius:—repealing a tax may require discernment, candour, philanthropy, and fortitude, — but it is a work of no difficulty, requires no extraordinary measure of science, nor even so much time as the imposing of one.

But by whatever plea the continuance of the subsisting taxes of this kind may be apologized for, nothing can be said in favour of any new addition to the burthen. The subsisting ones, it may be said, have been acquiesced in, and men are used to them: in this respect at least they have the advantage of any new ones which could be substituted in the room of them. But even this immoral plea, which puts bad and good upon a level, effacing all distinction but that between *established* and not *established*, even this faint plea is mute against any augmentation of this worst of evils.

To conclude: either I am much mistaken, or it has been proved,— that a law tax is the worst of all taxes, actual or possible: — that for the most part it is a denial of justice, that at the best, it is a tax upon distress:—that it lays the burthen, not where there is most, but where there is least, benefit: — that it co-operates with every injury, and with every crime: — that the persons on whom it bears hardest, are those on whom a burthen of any kind lies heaviest, and that they compose the great majority of the people: — that so far from being a check, it is an encouragement to litigation: and that it operates in direct breach of Magna Charta, that venerable monument, commonly regarded as the foundation of English liberty.

The statesman who cares not what mischief he does, so he does it without disturbance, may lay on law-taxes without end: he who makes it a matter of conscience to abstain from mischief will abstain from adding to them: he whose ambition it is to extirpate mischief, will repeal them.*

* The duties on nearly every proceeding, at law or in equity were repealed by the 5 Geo. IV. c. 41. The duties which were left were those upon proceedings, which were generally used for and operated as conveyances. By the subsequent alterations in the laws relating to fines and recoveries, these latter duties have become extinct also. — *Ed.*

General error makes law, says a maxim in use among lawyers. It makes at any rate an apology for law: but when the error is pointed out, the apology is gone.

NOTES.

Mem. — Anno, 1796. At a dinner at Mr. Morton Pitt's, in Arlington Street, Mr. Rose, then secretary of the treasury, in the presence of Mr. William Pitt, (then minister) took me aside, and told me that they had read my pamphlet on Law-Taxes; that the reasons against them were unanswerable, and it was determined there should be no more of them.

Anno 1804, July 10, 12, 14, 18. — This being in the number of Mr. Addington's taxes, Mr. Pitt, upon returning to office, took up all those taxes in the lump. On the above days, this tax was opposed in the House of Commons: and Mr. Wyndham, according to the report in the *Times*, on one of those days, spoke of this pamphlet as containing complete information on the subject; observing at the same time, that it was out of print. On behalf of administration, nothing like an answer to any of the objections was attempted: only the Attorney-General (Perceval) said, that the addition proposed to those taxes, was no more than equal to the depreciation of money.

Mr. Addington, before this, had recourse to the tax on medicine here spoken of, (page 575.) So that, in the course of his short administration, if the representation here given be correct, he had had the misfortune to find out and impose the two worst species of taxation possible. Compare this with Denmark, and its courts of *Natural Procedure*, called *Reconciliation Courts*.

26th February 1816.—Unalleviated by any adequate hope of use, too painful would be the task, of hunting out, and holding up to view, the subsequent additions, which this worst of oppressions has, in this interval of twenty years, been receiving.

Money, it is said, must be had, and no other taxes can be found. The justification being conclusive, the tax receives its increase: next year, from the same hand, flow others in abundance.

Grievous enough is the *income-tax*, called, lest it should be thought to be what it is, the *property-tax*. Grievous that tax is, whatever be its name; yet, sum for sum, compared with this tax, it is a blessing. Instead of 10 per cent. suppose it 80 per cent. Less bad would it be to add yet another 10 per cent. than a tax to an equal amount upon justice.

Grievous have been the additions, so lately and repeatedly made, to the taxes on *conveyances* and *agreements*. Extensive the prohibitory part of the effect, though the pressure,

confined as usual to the poor, *i. e.* the great majority of the community, who have none to speak for them, is scarcely complained of by the rich. Yet, were all law-taxes taken off, and the amount thrown upon *conveyances* and *agreements*, this — even this — would in reality be an indulgence.

Whether the oppression be more or less grievous, is never worth a thought. Will it be submitted to?—This is the only question. Charity is kicked out of doors. Hope is fled—faith and piety remain, and atone for everything.

For a list of about twenty-eight other sources of factitious delay, vexation, and expense, and thence of denial of justice, produced by the judges of former times, for the augmentation of lawyers' profit, their own included,—together with a list and summary account of the *devices* by which these burthens have been imposed, and by which *technical* stands distinguished from *natural procedure*, — See by the same author, *Scotch Reform*, &c. printed for Ridgway, Piccadilly. [Vol. V.]

ADDITION BY A LEARNED FRIEND.

IN the Court of Chancery, two cases have recently occurred, which may serve as an illustration of the extent in which the taxes upon law-proceedings may operate as a denial of justice. In one case, Roe *v.* Gudgeon, the defendant, in his answer to the plaintiff's bill, submitted that he ought not to be compelled to set out certain accounts which had been required by the bill, as the expense of taking what is called an office copy of them,—a necessary preliminary to any further proceeding on the part of the plaintiff in the cause, — would amount to the sum of £29,000: an expense almost wholly arising from the stamps on the paper, on which the office copy of the answer is compulsorily made. In this case the court determined, that it was not necessary these accounts should be set out: but in coming to this conclusion, how far the court was determined by the nature of the particular case, or by the magnitude of the expense that would thus be occasioned;—or whether if, without any such objection, the defendant had actually set out these accounts, the plaintiff could have been relieved from pursuing the regular mode of procuring a copy of them, and thus incurring the above expense; — or whether, if the expense had been instead of £29,000, only 28 or 27 thousand pounds, such an objection would have been listened to; — it is extremely difficult to say.

The other case alluded to is one in which, from peculiar circumstances, it is not thought proper to mention the names of the parties. It is optional with a man to be a plaintiff in a cause, — it is not altogether so optional with him to be a defendant. The preceding case shows that it is not always safe for a man to become a plaintiff, without £28,000, at least in his pocket to begin with, over and above what is necessary for his maintenance.—The following case shows that a man may not be always able to resist a demand, however unjust it may be, without being able to support an outlay of at least £800. In the case in question, the writer of this has been assured, —and from authority, which he has peculiar reason for relying upon, — that the expense of merely putting in an answer by *one* of the defendants to a bill in equity, amounted to the above sum of £800: what part of this expense was occasioned by the tax on law-proceedings cannot be accurately ascertained, but it assuredly constituted a very considerable proportion of that sum.

SUPPLY WITHOUT BURDEN;

OR

ESCHEAT *vice* TAXATION:

BEING

A PROPOSAL FOR A SAVING OF TAXES BY AN EXTENSION OF THE LAW OF ESCHEAT, INCLUDING STRICTURES ON THE TAXES ON COLLATERAL SUCCESSION COMPRISED IN THE BUDGET OF 7TH DECEMBER 1795.

(PRINTED IN 1793, AND FIRST PUBLISHED 1795.)

PREFACE.

Of the two essays laid before the public, that which presents a new resource was submitted to the proper authority in the month of September 1794, but was not fortunate enough to be deemed worth further notice. The arguments which it contains will speak for themselves; none were controverted, nor any hinted at on the other side; only as a matter of fact, it was observed, that it had not been customary of late for the *crown* to avail itself of the branch of prerogative here proposed to be cultivated for the *public* use.

Nobody can suppose that the minister would not gladly have availed himself of this, as of any other, source of supply, had it promised, in his conception, to conciliate the voice of the public in its favour. Nobody can suppose, that if the apprehensions that occurred in prospect should ever be dispelled by the event, the sense of the public would find him backward in conforming to it. It is natural that the difficulties attending a measure of considerable novelty and magnitude, should strike with a force proportioned to the responsibility of the situation to which the measure is presented. It is natural that they should strike with less than their proper force, on the imagination of him in whose conception it received its birth.

The idea had been honoured with the approbation of several gentlemen of eminence at the bar, some of them in Parliament, as many as had had the paper in their hands. If they were right in their wishes in its favour, it by no means follows, but those to whom it was submitted in their official capacities, did otherwise than right in declining to make use of it. Of all the qualifications required at the board to which it was presented, one of the most indispensable is *the science of the times;* a science, which though its title to the name of *science* were to be disputed, would not the less be acknowledged to be in the situation in question, "*fairly worth the seven.*" For that master-science none can have higher pretensions than the illustrious chief of that department, none less than the author of these pages.

Neither his expectations, nor so much as his wishes, in relation to this proposal, had extended so far as to its immediate adoption. It now lies with the public, who in due time will grant or refuse it their passport to the Treasury, and to parliament, according to its deserts.

The "*protest against law-taxes*" had better fortune: it received from the candour of the minister, on whose plans it hazarded a comment, all the attention that candour could bestow; and if I do not misrecollect, the taxes complained against did not afterwards appear

The publication of it in this country was kept back, till the proposal for a substitute to the tax complained of should be brought into shape. Upon the principle of the parliamentary notion, which forbids the producing an objection to a tax without a proposal for a better on the back of it. The two essays seemed no unsuitable accompaniments to each other. Mutual light promised to be reflected by the contrast between the best of all possible resources and the worst.

SECTION I.

GENERAL IDEA.

In a former essay* I pointed out the species of tax which, if the reasoning there given be just, is the *worst* of all taxes existing or pos-

* Protest against Law-taxes, printed 1793, now first published and subjoined to the present Essay, December 1795. [See the immediately preceding Tract.]

sible. The object of the present essay is, to point out that mode of supply which, for one of so great a magnitude will, I flatter myself, appear to be absolutely the *best*.

What is that mode of supply, of which the twentieth part is a tax, and that a heavy one, while the whole would be no tax, and would not be felt by anybody?

The question has the air of a riddle; but the proposition it involves, paradoxical as it may appear, is not more strikingly paradoxical than strictly true.

The answer is, an extension of the existing *law of Escheat*—a law coeval with the very first elements of the constitution; to which I would add, as an aid to its operation, a correspondent *limitation*, not an *extension* of the power of *bequest*.

Of the extended law of escheat, according to the degree of extension here proposed, the effect would be, the appropriating to the use of the public all vacant successions, property of every denomination included, on the failure of near relations, will or no will, subject only to the power of bequest, as hereinafter limited.

By near relations, I mean, for the purpose of the present proposal, such relations as stand within the *degrees* termed *prohibited* with reference to marriage.

As a farther aid to the operation of the law, I would propose, in the instance of such relations *within the pale** as are not only childless, but *without prospect of children*,†—whatever share they would take under the existing law, that instead of taking that share in *ready money*, they should take only the interest of it, in the shape of *an annuity for life*.

It would be a farther help to the operation of the measure, and (if confined to the cases where, from the nature of the relationship, the survivor is not likely to have grounded his plans of life upon the expectation of the succession, or otherwise to have placed any determinate dependence on it) may scarcely, if at all, be felt, if in such instances, although the relationship be *within* the pale, the public were to come in for a share in the succession (suppose an *equal* share,) though not the whole. This may be applied to the case of the uncle and aunt—to the case of the grandfather and grandmother—and perhaps, unless under particular circumstances, to the case of the nephew and niece.

With regard to *family settlements*, the persons whose benefit they have in view will be found provided for, with few or perhaps no exceptions, by the reservations made in this plan in favour of relations *within the pale*.

To make provision for the cases where, in virtue of an old settlement, an estate might devolve to a relation without the *pale*, I would propose to add a proviso, that wheresoever the deceased, had he been of full age, could by his single act have cut off the entail, it shall be as if he had actually done so for the purpose of excluding the distant relative.

This, in the instance of settlements already *existing*; as to future ones, there will be still less difficulty about confining *their* operation within the range meant to be allowed them by the spirit of the proposed law.

Regard to the principles of the constitution, not less than to the probability of carrying the measure through the Upper House, would, at the sametime, incline me to exempt the peerage from its operation, wheresoever the effect would be to deprive the title of any property which, under the existing law, would go to the support of it.

As to the latitude to be left to the power of *bequest*, I should propose it to be continued in respect of the *half* of whatever property would be at present subject to that power: the wills of persons in whose succession no interest is hereby given to the public, to be observed in all points as at present; as likewise those in whose succession an interest *is* given to the public, saving as to the amount of that interest—the plan consequently not trenching in any degree upon the rights of parents.‡

* To save circumlocution, relations, whom under this, or any other definition of *near* relations, I should propose to exclude, I shall term relations *without the pale:* those whom I should propose *not* to exclude, relations *within* the pale.

† Say, in the instance of females, 48;—in the instance of males, 60, if no child within 5 years past; or 55, if married to a wife above 48.

‡ Many writers (Blackstone for one) have treated the right of bequest with very little ceremony: many writers, without having in view any such public benefit as is here in question, have been for abolishing it altogether [the author of the Code Frederic for instance; Cocceiji, chancellor to the late king of Prussia. See the preface to that work.] Without entering into a discussion which is not to the present purpose, it will be sufficient here to observe, that not only the regard due to old-established privileges, and long-existing usages, but the success of the very system here proposed, though established in so great a degree at the expense of the power in question, may depend upon the leaving that power in possession of a very considerable degree of force. If a man were allowed no power at all over what property he left behind him, he would, in many instances, either be indifferent about getting it, or spend it as fast as he got it, or transfer it to some happier clime, where the interests of the community were better understood, and the feelings of individuals treated with more respect; and, in fact, a great part of the value of all property would be thus destroyed.

So much as to the abolishing the power altogether: as to the narrowing it in the manner here proposed, should that be objected to as too great a hardship, let it be considered, that the defalcation thereby proposed to be made from the powers of proprietors in general, falls short by much more than half the quantum of restriction im-

To give the plan its due effect, it will be seen to be indispensably necessary, in the first place, that the whole property in which the public shall thus have acquired an interest, shall, whatever it consists of, be converted into *ready-money:* property in the funds alone excepted, from which the public cannot reap so great a benefit in any other way than by the sinking of so much of its debt in the first instance; in the next place, that to prevent collusive undervaluation, and the suspicion of it, the conversion shall in every instance be performed in the way of *public auction.* As to the reasons for such conversion, they are tolerably apparent on the face of the proposition; and they will be detailed in their proper place.

What will also be seen to be necessary is, that wherever the public has any interest at all in any succession under the proposed law, the officer of the public, *i. e.* the officer of the crown, shall enter into the possession and management of the whole in the first instance, in the same manner as assignees of bankrupts do in respect of the whole property, *real* and *personal* together, or administrators or executors do in respect of the personalty: not to mention the *real* in some cases, as where, by a clause in the will, it is ordered to be sold.

Of the several extensions above proposed, it may be observed, that though they operate, all of them, to the augmentation of the produce, and in so far at least to the *utility* of the measure, yet are they not any of them, so indispensably *necessary* to its adoption, but that they may be struck out or modified, or even added to by further extensions, and the principle of the plan still adopted—the essence of it still preserved.

It may be a satisfaction to see at this early stage of the inquiry the principles by which the *extent* that may with propriety be given to this resource appears to be marked out and limited. The propositions I would propose in that view are as follows: —

I. Whatever power an individual is, according to the received notions of *propriety*, understood to possess in this behalf, with respect to the disposal of his fortune in the way of *bequest*, — in other words, whatever degree of power he may exercise without being thought to have dealt *hardly* by those on whom what he disposes of would otherwise have devolved, — that same degree of power the law may, for the benefit of the public, exercise once for all, without being conceived to have dealt *hardly* by anybody, — without being conceived to have *hurt* anybody, — and, consequently, without scruple: and even though the money so raised would *not* otherwise have been to be raised in the way of taxes.*

II. Any further power which could be exercised in this way to the profit of the public purse, and of which the exercise, though not altogether clear of the imputation of producing a sense of hardship, would, at the same time, be productive of *less* hardship than the lightest tax that could be substituted in the room of it, ought, if the public mind can be sufficiently reconciled to it, to be exercised in preference to the establishment of any tax.

III. A power thus exercised in favour of the public purse, would go beyond the latitude given by the first rule, and would accordingly be productive of a sense of hardship, in as far as it went the length of producing, in any degree, any of the following effects, viz.

1. If it extended to the prejudice of the joint-possession customarily enjoyed by a man's *natural* and necessary dependents, such as children, and those who stand in the place of children.

2. If it went to the bereaving a man of the faculty of continuing, after his death, any support he had been in the habit of affording to *relatives* of any other description, whose claims to, and dependence on such support,

posed by the terms of marriage settlements on the description of proprietors whose lot in point of property is most envied — the great body of the nobility and landed gentry. In this plan there is nothing to preclude a man from *charging* his estate — from *changing the nature* of it as often as he pleases — from improving any part by selling or charging another — or from *giving* or *spending* it in his lifetime.

* If without provocation on the part of my *children*, I were to let in strangers, or mere collateral relations, for an equal share of my fortune, my children would feel themselves injured, other people would look upon them as injured, my behaviour to them would be universally regarded as cruel or unnatural. A man is considered, indeed, as having his own fortune pretty much in his power, as against one child in comparison with another, but very little so as against his children taken together, in comparison with collaterals or strangers.

How stands it with regard to nephews and nieces? Is he considered as lying under the same restraint with regard to them? No, nor anything like it. If it be his pleasure to give them all, so he may, they being his nearest relations, and without being thought to do amiss by anybody else: but should it, on the other hand, be his pleasure to prefer to them a set of individual friends, or a public institution, say with respect to half, yet so as he does but leave them the other half, they will scarcely be looked upon as ill-used. Had he indeed exercised no such power at all over his property — had he suffered the law in this behalf to take its own course, they would, it is true, have got the whole. But why? only because somebody must have it, and as they stand nearest, there is nobody else to take it. I say nothing here of brothers and sisters, fathers and mothers, uncles and aunts, grandfathers and grandmothers, they would lead me too far into details.

are, by reason of the nearness of the relationship, too strongly rooted in nature and opinion, to be capable of being dissolved by the dispensations of law.

3. If, by putting it out of the power of a relation of parental age, to receive, at the death of a relation of inferior age, an adequate indemnification for requisite assistance, given in the way of *nurture*, it threatened, by lessening the inducements, to lessen the prevalence of so useful a branch of natural benevolence.

4. If it went to the bereaving a man of the faculty of affording an adequate *reward for meritorious service*, of whatsoever nature, and by whomsoever rendered, lessening thereby the general disposition among men to the rendering of such service.

5. The effect of such an extension of the proposed power would be purely mischievous, if what were gained thereby on one hand, by the augmentation of the share taken into the hands of government, at the expense of the power of bequest, were to be lost, on the other hand, by a proportionable diminution effected in the whole mass of property in the country, in consequence of the diminution of the inducements to accumulate and lay up property, instead of spending it.

6. The public mind must, in this instance, as in every other, be, at any rate, treated with due deference. In this instance, as in every other, a law, however good in itself, — however good, on the supposition of acquiescence, — may become bad, in any degree, by unpopularity: by running too suddenly and directly against opinions and affections that have got possession of mankind.

Thus much for the rules that may serve for our guidance in adjusting the extent that may be given to this resource. They may be trusted, it should seem, for the present, at least, to the strength of their own self-evidence. The application of them to practice, the application of them to the several modes and degrees of relationship, and to the several situations and exigencies of families, is matter of detail that will meet us in its proper place.

SECTION II.

ORDER OF THE DETAILS.

IN continuing the thread of this proposal, the following is the course I propose to take: —

1. To give a brief view of the *advantages* or beneficial properties that appear to recommend the measure to the adoption of government.

2. To show how *distinct* it is, in reality, from all taxes on *collateral successions*, which have ever been established or proposed, and how much the distinction is to its advantage.

3. To exhibit the best idea I am capable of giving of the probable amount of the *produce* that may be expected from it.

4. I shall add a few observations relative to the most eligible *application* to be made of that produce.

Descending further into detail,*

5. I shall give a more particular view of such *regulations* as may seem proper to be inserted for the purpose of applying to practice the principles already exhibited.

6. I shall attempt a sketch of an *official establishment* for the *collection* of the produce.

7. I shall consider the measure with reference to the cases where the interest of individuals belonging to nations altogether *foreign*, or nations *co-ordinate* with or *subordinate* to the British, are concerned.

8. I shall consider it with reference to the cases where the *property* in question happens to be *situated* anywhere *without* the limits of the laws of Great Britain.

9. I shall attempt a general sketch of a *plan* for the *collection* of the produce: in the course of which attempt, I shall have occasion to advert to the differences that may be suggested by the *nature* of the *property* which may come to be collected: to the means of guarding against *concealments* and other *frauds* to which the property in its several shapes may be exposed, on the part of such individuals, whose interest or affections may be at variance, in this behalf, with the interest of the public; as also against any such *abuses of power* and other *mismanagements*, as the servants employed on behalf of the public in this business, stand exposed, by their respective situations, to the temptation of being chargeable with.

In a sort of Appendix, which those who may find themselves already satisfied with the principle of the mode of supply, may spare themselves the trouble of looking into,

10. I shall defend the proposed institution against every *objection* which my imagination can represent to me as capable of presenting itself.†

11. I shall show that a latitude, much beyond what is here proposed to be assumed, stands warranted by the *opinions* of the most respected writers.

12. That it is equally warranted by *precedent*, that is, by the disposition of law in

* The matter belonging to the ensuing heads is not all of it included in the present publication. No part of it was sent, the demand for it depending upon the approval or disapproval of the principle of the measure; nor has it ever been thought worth while to work up into form any more than is here subjoined. — *Note added in December* 1795.

† Heads of objections, with answers, were sent, in form of a table, and being now printed *verbatim*, form the matter of one of the ensuing sections.—*Note added December* 1795.

this country from the primitive ages of the constitution down to the present times.

13. Lastly, in the way of supplement to the refutation of the several imaginable objections to the proposed measure, I shall endeavour to give a comprehensive idea of the several *effects*, as well immediate as remote, that appear any way likely to result from it, considered in every imaginable point of view.

SECTION III.

ADVANTAGES.

THE advantageous properties of the proposed resource may be stated under the following heads, viz. —

1. Its unburthensomeness.
2. Its tendency to cut off a great source of litigation.
3. Its favourableness to marriage.
4. Its probable popularity on that score.

Its *unburthensomeness*, which is the great and transcendent advantage, is not matter of surmise: it is testified by experience: it is confirmed, as we shall see, by the most indisputable principles of human nature — by the fundamental constitution of the human feelings.

1. It is testified by *experience*. On the decease of my uncle, who had children before I was born, the law gives everything to his children, nothing to me. What do I suffer from finding myself thus debarred? Just nothing — no more than at the thoughts of not succeeding to the stranger whose hearse is passing by.

What more should I suffer, if my uncle's property, instead of going to his children, were known beforehand to go to the public? In point of personal feeling, at least, nothing: sympathy for my cousins, in the case of their being left destitute, is a different concern.

Living under the law of England, I find myself debarred from a succession, in which I should have shared had I lived under the law of Spain. What do I suffer at hearing this? Just nothing: no more than I suffer at the thoughts of not being king of Spain. But if the law of England were to be changed in this behalf, in conformity to the measure proposed, what is now the existing law would be to me no more than the law of Spain.

My father gets an office: upon his decease, the office goes to the nominee of the king, from whom he got it, not to me. Do I regard the successor as an intruder? — do I feel his taking possession of the office as a hardship upon me? No more than I do his Majesty's having succeeded to the crown instead of me.

Under the *existing* law of escheat, real property, on the absolute failure of all heirs, lapses to the crown already. Is there anything of hardship felt by *any* body? If there were, it would be a cruel hardship, for it would be felt by *every* body.* Give to this branch of law the extent proposed, confining it always within the bounds above traced out, and it will be even then as unburthensome as it is now.

Thus stands the resource in point of unburthensomeness, as demonstrated by experience. What does so singular a property turn upon? Upon a most simple and indisputable principle in human nature — the feeling of *expectation*. In the case of acquiring or not acquiring — of retaining or not retaining — no hardship without previous expectation. *Disappointment* is expectation thwarted: in the distribution of property, no sense of hardship but in proportion to disappointment. But expectation, as far as the law can be kept present to men's minds, follows with undeviating obsequiousness the finger of the law. Why should I suffer (bodily distress from want out of the question) — why should I suffer, if the property I call *mine*, and have been used to regard as mine, were to be taken from me? For this reason, and no other: because I *expected* it to continue with me. If the law had predetermined that the property I am now using as mine, should, at the arrival of the present period, cease to be mine, and this determination of the law had been known to me before I began to treat it as mine, I should no longer have *expected* to be permitted to treat it as mine: the ceasing to possess it, the ceasing to treat it as mine, would be no *disappointment*, no hardship, no loss to me. Why is it that I do not suffer at the reflection that my neighbour enjoys his own property, and not I? Because I never *expected* to call it mine. In a word, in matters of property in general, and succession in particular, thus then stands the case: *hardship* depends upon *disappointment*; *disappointment* upon *expectation*; *expectation* upon the dispensations, meaning the *known* dispensations of the law.

The riddle begins to solve itself: a part taken, and a sense of burthen left; the whole taken, and no such effect produced: the effect of a part greater than the effect of a whole: the old Greek paradox verified, a part greater than the whole.† Suffer a mass of property in which a man has an interest to *get into his hands*, his expectation, his imagination, his at-

* I leave out of the supposition the case where there is a father left, a grandfather, or a relation of the half blood, and the estate escheats to the prejudice. These are but too real hardships; but they belong to the law in its present state, were ingrafted into it by accident, and would not continue in it in its proposed extended state if the choice depended upon me. Thus much must be acknowledged: the removal of them is a separate question, bearing no necessary relation to the present measure. [The law of England in this respect was altered by 3 and 4 W. IV. c. 106. — *Ed.*]

† —— πλεον ημισυ παντος.

tention at least, fastens upon the whole. Take from him afterwards a part; let it be such a part and no other, as at the time of his beginning to know that the whole was to come into his hands, he knew that he would have to quit: still, when the time comes for giving it up, the parting with it cannot but excite something of the sensation of a loss—a sensation which will of course be more or less pungent according to the tenacity of the individual. *Ah! why was not this mine too? Ah! why must I part with it? Is there no possible means of keeping it? Well, I will keep it as long as I can, however; and, perhaps, the chapter of accidents may serve me.* Take from him now (I should not say *take*,) but *keep* from him the whole; so keeping it from him that there shall never have been a time when he expected to receive it. All hardship, all suffering, is out of the case: if he *were* a sufferer, he would be a sufferer indeed; he would be a sufferer for every atom of property in the world possessed by anybody else; he would be as miserable as the world is wide.*

Under a tax on successions, a man is led, in the first place, to look upon the whole in a general view as his own: he is then called upon to give up a part. His share amounts to so much—this share he is to *have;* only out of it he is to *pay* so much *per cent.* His imagination thus begins with embracing the *whole;* his expectation fastens upon the whole: then comes the law putting in for its *part*, and forcing him to quit his hold. This he cannot do without pain: if he could, no tax at all, not even a tax on property, would be a burthen; neither land-tax nor poor's-rate could be too high.†

The utility of that part of the proposal which gives to the public officer possession of the whole, whether the public, in conclusion, is admitted to the whole, or only to a part, may now be seen in full force. It is a provision not more of *prudence* with a view to the public, than of *tenderness* with a view to the individual. Had he been suffered to *lay his hands* upon the *whole*, being afterwards or even at the time called upon to *give* up a *part*, his attention would unavoidably have grasped the whole: the giving up the part would have produced a sensation, fainter perhaps, but similar to that produced by an unexpected *loss:* on the other hand, as according to the proposal he *takes* nothing that he does not *keep*, no such unpleasant sensation is produced.

The case where the individual sees a share go from him for the benefit of the public in the way of *partition*, stands in this respect between the case where the public is let into the whole, and that where a part is taken from him in the way of a *tax*. Whether, on this plan of partition, the individual shall feel in any degree the sensation of a loss, will depend partly upon the mode of *carving out* the share—partly upon the *proportion* taken by the law—partly after all upon the temper and disposition of the individual. As to the *mode of carving*, the whole secret lies in taking the public officer and not the individual for the *carver*, for the reasons that have been seen. As to the *proportion*,—to come back to the paradox, the larger the share of the public the better, even with reference to his feelings; for the larger it is, the more plainly it will show as a *civil* regulation in matters of succession: the smaller, the more palpably it will have the air of a *fiscal* imposition—the more it will feel, in short, like a *tax*. The more is taken under the name of a tax, the more burthensome the measure, as everybody knows: at the same time, the more is taken for the public under the name of *partition*, so long as an equal or not much more than equal share is left to the individual, the farther the measure from being burthensome, because the farther from being considered as a tax. The Roman tax of *five per cent.* on collateral successions was considered as a heavy burthen; a tax of *fifty per cent.* imposed under the name of a tax, would have been intolerable: at the same time, pass, instead of the tax, a law of inheritance, giving the public *fifty per cent.* upon certain successions, the burthen may be next to nothing: pass a law of inheritance, giving the public the whole, the burthen vanishes altogether. The dominion of the imagination upon the feelings is unbounded: the influence of names upon the imagination is well known. Things are submitted to without observation under one name, that would drive men mad under another. Justice is denied to the great bulk of

* *Better to have nothing than to have a share*, (says an objector.) *How can that be? Is not the man himself the best judge? Ask him, then, which is best for him—share or no share?* Any answer is—the question does not meet the case. You suppose his attention previously drawn to the subject:—you have raised his expectation; you have given him his option between *some* and *none*:—that being the case, his answer, it is true, cannot but be as you suppose. Not to come in for anything, would now be a disappointment. It will even be a disappointment should the share he gets prove smaller than what he hoped to get: and the disappointment will be not less, but greater, if he gets no share at all. True; but all this depends upon the *option:* accordingly, in the case *you* suppose, there *is* an option given; whereas in the case *I* suppose, there is *none*. When an estate in England has been limited away from a man altogether, he never looks at it:—what should lead him? he has no more option in it than in the kingdom of Spain.

† Try the experiment upon a hungry child: give him a small cake, telling him, after he has got it, or even before, that he is to give back part of it. Another time, give him a whole cake, equal to what was left to him of the other, and no more, and let him enjoy it undiminished:—will there be a doubt which cake afforded him the purest pleasure?

the people by law-taxes, and the blind multitude suffer without a murmur. Were the distribution of justice to be prohibited in name, under a penalty to the amount of a tenth part of the tax, parliament would be blown into the air, or thrown into a mad-house.

Would it be better, then, upon the whole, for the public to take *all*, and let no relation in for a share? Certainly not in every case: the law is powerful here; but even *here*, the law is not absolutely omnipotent. It can govern *expectation* absolutely, meaning always in as far as it makes itself present to the mind: it can govern expectation absolutely; but governing expectation is not everything. It may prevent me from being *disappointed* at not having bread to eat; but if, by preventing my having bread to eat, it starves me, it will not prevent me from suffering by being starved. It can save me, in this way, from *ideal hardship*, but not from *corporal* sufferance. It can save me from disappointment at not *beginning* to enjoy, but it cannot save me from disappointment at not *continuing* to enjoy, after the habit of enjoyment has grown upon me. Hence the necessity of consulting the rules of precautionary tenderness that have been exhibited above.

Unburthensomeness is a praise that belongs to this mode of supply in another point of view: with reference to the business of *collection*. In many instances, so great is the incidental burthen accruing from this source, as almost to rival in real magnitude, and even eclipse in apparent magnitude, the principal burthen which is the more immediate fruit of the fiscal measure. This is more eminently the case in the instances of the *customs* and the *excise* — of those branches of taxation by which by far the largest portion of the revenue is supplied. The officer of excise goes nowhere where he is not a guest; and of all guests the most unwelcome. The escheator will have nowhere to go where he is not *at home* — into no habitation, into no edifice, not so much as upon a foot of land, which is not to this purpose — which is not, as against all *individuals*, his *own*. No jealousies — no collision of rights — no partial occupations extorted at the expense of the comfort and independence of proprietors. The excise is not only the most productive branch of the revenue, but the most capable of extension, and therefore the most liable to be extended. It can surely be no small merit in the proposed supply, in addition to its other merits, that in proportion as it extends, in the same proportion it puts a stop to the extensions of the excise.

2. The advantages that follow are of minor importance. The advantage of checking litigation in this way, by the diminution of its aliment, is, however, not to be despised. The fishing in the troubled waters of *litigation*, for the whole or a part of the property of a distant relation, or supposed relation, is one of the most alluring, and at the same time most dangerous pursuits, by which adventurers are enticed into the lottery of the law. It is like the search after a gold mine — a search by which the property of the adventurer is too often sunk before the precious ore is raised. Causes of this nature are by no means unfrequent in Westminster Hall; the famous *Selby* cause was a bequest nominally to relations, really to the profession. This source of litigation would be effectually dried up by the measure here proposed.

An item which may naturally enough be added to the account of advantage, is the favour shown to *marriage*, and in particular to *prolific marriages* — the sort of marriages of which the title to legislative favour stands in the most plausible point of view.

That the influence of the system in question would be favourable to marriage, and in particular to prolific marriage, will hardly be disputed. Of fathers and mothers of families, it leaves the powers untouched: — it places them, in comparison with single persons of both sexes, in a situation of privilege and pre-eminence. Within the threshold of him whose marriage has fulfilled the ends of marriage, the foot of the officer of the revenue has no place. His will is executed in all points; whatever he bequeathes — to whomsoever he bequeathes it — offspring, relation, or stranger — passes without deduction. Whatever restriction it imposes, is all at the expense of the celibatary and unmarried. If with propriety it could be styled a *tax*, it would be a *tax* on *celibacy*.*

An advantage of a less questionable nature is the popularity which seems the natural effect of any measure wearing the complexion above mentioned; for popularity, it must be confessed — popularity, how hollow soever be the ground it stands upon — can never be refused a place among the advantages of a measure. Satisfaction on the part of a people — satisfaction, so long as it subsists, is a real good — so long as it subsists, its title to that appellation is altogether independent of the source from which it flows. If, indeed, the utility of the measure be illusory, then, indeed, when the illusion is dispelled, there is an end of the advantage; but the advantage, so long as it continued, was not the less real. Happily, in the present instance, the advantage is not only *real*, but *pure*. Though in the way of afford-

* In my own estimation, the good that can be done by any encouragements of a *positive* nature given to marriage, shows itself, I must confess, in a very questionable point of view; but the reasons in support of this opinion not being to the present purpose, will be better spared than given. I say *positive;* for as to the negative kind of encouragement that, in the instance where any obstacles of a political nature can be shown to subsist, may be afforded by the removal of those obstacles, the utility of this species of encouragement stands upon a footing altogether different.

ing encouragement to marriage, the proposed measure should in truth be of little service, any farther than as it happened to be thought to be so, the pleasure of seeing it popular on this score may be indulged with the less reserve, as the delusion, if it be one, is not in this instance attended with any pernicious consequences.

SECTION IV.

ORIGINALITY.

IF the proposal relative to this resource be not an *original* one, its want of originality may be seen to afford an objection. If not original, it has been *proposed;* and if it has been proposed, it has been *rejected*, for assuredly it has not been adopted anywhere.

A *tax on successions* might at first glance present itself as bearing a resemblance to the resource in question; as being a sort of modification of it—a commencement towards it—as forming in a manner a branch of it. But we have already seen how perfectly dissimilar, or rather opposite in effect, the *tax* is to the *regulation*, and how much the difference to its disadvantage. A tax on successions lies as heavy on the individual as it falls light into the Exchequer.

Taxes on successions (not to mention the old Roman tax, the *vicesima hereditatium*, the 5 *per cent.* on collateral successions) exist already in this country: they exist in the form of a stamp-duty, in some degree proportional, on probates and letters of administration; they exist in the form of a stamp duty on receipts for legacies and distributive shares. As to the duties on legacies, in what proportion they are *paid* I do not know; but I am sure they are *evaded*, and very frequently evaded. One should be almost sorry if they were *not* evaded: they are evaded in proportion as confidence prevails in families. The whole mass of property goes in the first place into the hands of individuals; a course which, indeed, it could not but take, so long as the resource is left to stand upon the footing of a tax. The private executor sets out with getting everything into his hands: the public gets what this most confidential friend of the deceased thinks proper to bestow; of course he will not bestow anything at the expense of the friend of his testator, so long as he can persuade himself with any tolerable assurance that the person he is befriending will not requite his generosity with such a degree of baseness as to make him pay the legacy over again out of his own pocket.

Another circumstance concurs in diminishing the productive power of a tax upon successions. When the duty amounts to a sum which appears considerable, the levy being a tax—a tax to be levied on an individual, and levied all at once, it wears so formidable an aspect, that the man of finance himself is startled at it: he accordingly reduces the rate, and the higher the legacy amounts, the more he reduces it; so that all proportionality is destroyed. By this means, the better a man can afford to pay, the less it is he pays; and the tax has the appearance of a conspiracy of the richer against the poorer classes of mankind.

Whence comes this? Only from its being raised by a *tax*, and not by a *regulation*, as above proposed. Under the regulation, the public will pay itself; the officer of the public will have the staff in his hands; a partiality as unfriendly to the interests of finance as it is unseemly in the eyes of justice, will disappear, and wealthy successions will yield in proportion to their opulence.*

SECTION V.

PRODUCE.

To Mr. ————

Instead of the matter destined for the present section, I must content myself for the present with sending you little more than a blank. I could not have filled it up without attempting to lead you into a labyrinth of calculations, which, after all, I could not render complete, for want of *data*, without your assistance, and which, if the *principle* of the measure should not be approved of, would have no claim to notice.

Meantime, as the result of the calculations need not wait for the calculations themselves, and as a supposition of this sort, however imperfectly warranted, may be more satisfactory than a total void, I will beg your indulgence for the following *apperçu*.

Net annual produce of this resource, upwards of £2,000,000 over and above the expense of collection:—

Expense of Collection.

Escheators and sub-escheators, at 5 per cent. upon the above produce, ...	£100,000
Judicial establishment for the purpose, at 2½ per cent., which I apprehend could not be dispensed with, ...	50,000
Total, at 7½ per cent.	£150,000

* The freshest and most considerable tax upon legacies and shares in successions (that of 29 Geo. III. c. 51, anno 1789,) has freed itself so far from this objection; but the duties on probates and letters of administration remain exposed to it; as do the anterior taxes on legacies and shares in successions imposed by 20 Geo. III. c. 28, anno 1780. The reason, in the instance of the duty on probates and letters of administration, seems to be, that in that stage the value of the subject can only be *guessed at*, whereas in the other cases it has been *liquidated*.

It is natural I should be over sanguine; but I must confess I should expect to find the above sum below the mark, rather than above it. The calculations in their present state point at three millions; but then there are deductions to be made on one hand, as well as additions on the other.*

For my own part, if it depended upon me, I should be very much disposed to turn my back upon calculations; for if the *principle* of the resource be but approved of, £200,000 a-year would be as sufficient a warrant for it as £2,000,000, since, whether much or little, it would be all so much clear gain, unfelt by anybody in the shape of a loss.

The calculations, however, such as they are, can be submitted at any time upon a day or two's notice. They will, at any rate, afford a view of the *data* the subject affords, of the difficulties to be overcome, and of the uncertainties which are not capable of being cleared up without the aid of parliament.

SECTION VI.

APPLICATION.

A WORD or two may not be amiss respecting the application of the produce. In general, this topic may seem foreign enough from the consideration of the supply itself; but that, as we shall see, is not altogether the case here.

In time of full peace, the floating debt provided for, there are but two options with regard to the application of a new supply: reduction of debt and extinction of taxes; for current service is already provided for by existing funds.

In time of war, there are two additional options: pledging for interest of loans, and application to current service.

I will begin with the case of war; for though the measure would be equally fit for establishment at either season, yet war is certainly that which holds out to it the most promising chance for being actually established. *Necessity*, the mother of *invention*, may then be the mother of *adoption* too, which of the two, is by much the hardest offspring to bring forth.

I should not wish, or even expect, to see the produce of this resource appropriated to current service; I should not wish, or even expect, to see it among the mass of pledges given as security for a loan. The novelty of its complexion, the uncertainty of its amount, both seem to preclude it from either destination: it may be prodigious, it may be nothing: there is no saying what it may be *taken* for. resources more according to the usual model, and therefore regarded as more certain — *taxes*, in a word, would be the supplies naturally destined to such service.

There remain, *discharge* of debt, and *extinction of taxes*. Between these two employments I would wish to see it divided, and perhaps pretty equally divided.

There is one portion that could not well be refused to the discharge of public debt — even in war-time — even under the pressure of any exigency: I mean the portion which exists already in that shape — where the property consists of a debt due from government, to be discharged by an annuity till paid off; in a word, property in government-annuities, or (as it is commonly termed, to the great confusion of ideas) *money in the funds*. The extinction of so much of the debt is here so natural a result, that it may be set down as an unavoidable one: — to keep the debt alive, and sell it for the benefit of government (just as, if it had fallen into individual hands, it might have been sold for the benefit of individuals,) will surely not be thought of.

Remit taxes? and that in war time? That would be an extraordinary employment for it indeed! Extraordinary, indeed, but not on that account the less eligible: novel blessings shine but the brighter for being new.

An opportunity would, by this incident, be presented, and perhaps this is the only incident by which such an opportunity could be presented, of shaking off the yoke of some of the most oppressive taxes. The whole list would then be to be overhauled, and the worst chosen, picked out, and expunged.†

Those which, to my conception, would stand at the head of the list, are, as I have said already, the taxes upon justice. In relation to these, I can speak with confidence, having sifted them to the bottom, and demonstrated them — or I know not what de-

* The documents resorted to as *data* for calculation, were the instances of *collateral* succession in different degrees, compared with those of *lineal* succession, as indicated by the publications on the peerage. The *data* thus obtained were digested into Tables, including Scotch and Irish, as well as English and British, existing as well as extinct.—*Note added Dec.* 9, 1795.

† *Fresh* taxes have, in many instances, been repealed upon fresh experience of their ineligibility or unpopularity; examples of the repeal of an *old-established* tax are rare indeed.

That of the *tax on coals borne coastwise* is an instance as honourable to those with whom the repeal originated as it is rare. As to the taxes not *taken off*, but *reduced*, on the institution of the commutation tax, the reduction was made, not because they were *ill-chosen*, for they were nothing less than ill-chosen, but because they had been strained so high as to become *unproductive*: it was made, not for *relief*, but for *revenue*.

monstration is — to be the worst of all taxes, actual or possible.

Further from the precise limits of the subject I will not attempt to stray; unless it be for a fantastic moment in the way of reverie. Pure as we have found the resource to be from *hardship*, and, in all human probability, from *odium*, how pregnant may we *imagine* it at least to be of *relief!* No law-taxes — no prohibition of justice. No tax on medical drugs — no prohibition of relief from sickness and from death. No window-tax — no prohibition of air, light, health, and cheerfulness. No soap-tax — no prohibition of cleanliness. No salt-tax — no prohibition of the only sustenance of a famished people.* Make the most of this resource, and, if not all these reliefs, at least the most essential of them, might, perhaps, be afforded, even under the pressure of the war. To do all this, and government never the poorer! To do all this, and have a rich surplus for the sinking fund! what a feast for humanity! what a harvest of popularity! what a rich reward for wisdom and virtue in a minister!

It is scarce necessary to observe, that neither in any of those ways, nor in any other, should specific relief be engaged for, till the means of relief are actually in hand. The produce should be taken for nothing, till it is actually in the Exchequer. When a year of probation is elapsed, the amount will, for any reason that can be alleged to the contrary, be as uniform as that of the steadiest tax.

SECTION VII.

HEADS OF OBJECTION, WITH ANSWERS.†

OBJECTION I. *Supposed tendency to promote dissipation of the national wealth*, by leading men to live upon their capitals, or sell them for annuities for their own lives, in consequence of their being restrained from benefiting those that are dear to them after their death.

Answer: No such tendency; for —

1. A man *will not* bar those that are *dear* to him, from receiving *any* part, only because there is *some* part that he *cannot* enable them to receive.

2. Nor *himself* from disposing in that manner of *any* part, only because there is *some* part that he can *not* so dispose of.

3. The power of benefiting others after death is not the sole motive to accumulation: another, and a still stronger and more universal one, is the faculty of increasing a man's fund of personal enjoyment during life — a faculty which would be at a stand, if he parted with his capital for an annuity.

4. Such dissipation, were it really to be, in here and there an instance, the result of the measure, would only be a *diminution*, and that a most trifling one, from the *benefit* of it — not any *objection* to the *principle* of it.

Objection II. Breach of faith in the instance of property in the funds.

Answer: Not unless *confined* to that species of property, which is not proposed, —

No more than the *existing* taxes on *distributive shares* and *legacies*, which, in as far as there is nothing else to pay them, must come out of any property a man had in the funds: no more than any tax on consumption, which must fall upon *stockholders* in common with other people; since, in as far as a man's own income arises out of the funds, every tax he pays is paid out of what he has in the funds.

Property is not in this way the *more* affected for being in the funds; since in any other shape it would be equally reached by the proposed regulation.

Objection III. *Breach of faith in the instance of foreign stockholders resident abroad*, who would not have been affected by the taxes in lieu of which this would come.

Answer: None; for they may sell out.

Reply: The sort of obligation they will thereby be laid under to sell out, is still a hardship; the more, as their submitting to it will lower the price.

Answer: Yes; were many likely to sell out on this account, but that is not in the case, —

1. Because much of such stock is in the hands of *bodies corporate*.

2. Among individuals, it is but a small proportion that will be destitute of relations *within the pale*.

3. Fewer still who would take to heart to such a degree a restriction from which a man's near relations stand exempted.

4. Feeling it to be in his power to sell out at *any* time, a man would neither sell out at *first* nor *afterwards*.

Objection IV. It is *pro tanto* very much exposed at least to evasion.

Answer: 1. To none but what may be pretty effectually guarded against by proper *registers*, &c.

2. If it could not, the objection applies, not to the *principle* of the measure, but only to the *quantum* of advantage.

3. It removes *pro tanto* the objection of *breach of faith*: so far as a man *evades*, so far he is *not hurt*.

Objection V. Tendency to sink the price of land by glutting the market with it.

Answer: 1. No reason for supposing it will tend to *sink* the price in one way, more than it will to *raise* it in another; for,

1. Income arising out of *land* being more generally eligible, will always fetch more than equal income arising out of the *funds* — still

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* Fish to the Highlanders of Scotland.

† *To Mr.* ——. This is but an index: the objections and answers are given at large in the body of the paper.

more than equal income depending upon mere *personal* security.

II. Nothing, therefore, can sink the price of land, without sinking that and the price of stocks together; nor without sinking the price of stocks more than the price of land; nor raise the price of stocks without raising the price of land.

III. It will tend to *raise* the price of stocks at any rate, as to that part of the property it attaches upon, which it finds *already* in the shape of stock, and which it will of course extinguish and take out of the market. As also in respect of whatever other part is applied to the extinction of the public debt.

Admitted, that a depreciation in the price of property in land, in comparison with that of property in the funds, might take place, if land were as yet at a monopoly price, as Adam Smith seems to think it is. B. iii. c. 4.

But this does not seem to be the case, since a man can make *three per cent.* by laying out his money in land, when he can make but *three and a half per cent.* by laying it out in the funds; which is no more than an adequate difference for the difference in point of general eligibility between the two sources of income.

2. A fall in the price of land is considered not as an ineligible, but as an eligible event, by Adam Smith (B. iii. c. 4,) though not by me, who, referring everything to the feelings of individaals, regard the sensation of loss thus produced, as an evil outweighing every possible advantage.

Objection VI. Money thus obtained will be *collected* at greater *expense* than if obtained from taxes.

Answer: 1. No particular reason for thinking so.

2. Were this clear, it would afford no objection, because none of the *hardship* would be produced here, which is the result of expense when defrayed by taxes.

Objection VII. Increase of the influence of the crown by the new places that would be necessary.

Answer: 1. Not more from *this* mode of supply, than from any other of equal magnitude.

2. Were the objection anything determinate, the weight of it would bear, not against a *useful* establishment like this, but against *useless* or *less useful* places.

3. The objection, if it were worth while, might be got rid of in part, by giving the appointment of *escheators* to the *freeholders*, who now have the appointment of *coroners*.

Objection VIII. The powers that must be given for the purpose of collection would be abused.

Answer: 1. This mode of supply is not more open to abuse of power, to the *prejudice* of the individual, than any other.

2. Abuse of power by undue *indulgence* to the individual, to the prejudice of the revenue, goes only to the *quantum* of the advantage, and forms therefore no objection to the *principle* of the measure; and as to the individual, so far as he is *indulged*, duly or unduly, he is not *hurt*.

3. Abuses of both kinds may be more effectually checked in this instance than in others; viz. by the publicity that, even for other purposes, would require to be given to the proceedings.

The remark, though bad as an *objection*, is good as a *warning*, and as such would be attended to.

Objection IX. By the facility it would give to the business of supply, it would be an encouragement to *profusion* on the part of government.

Answer: If this were an objection, the most burdensome mode of supply would be the best.

Rendering supply more burthensome than it might be, is a remedy worse than the disease; or rather an aggravation of the disease, to the exclusion of the remedy.

The following are the suppositions which the objection must take for granted: — 1. That all expenditure is unnecessary; 2. That this mode of supply would be submitted to; 3. That no other would.

It would be a strange inconsistency if those who could not be brought to adopt other modes of checking profusion, could, in the mere view of checking profusion, be brought to reject this mode of supply.

Objection X. It would make a *revolution* in property.

Answer: The tendency of this objection, the force of which consists altogether in the abuse of a word, is to point to a wrong object the just horror conceived against the *French* revolution. The characteristic of *that* revolution is to trample in every possible way upon the feelings of individuals. The characteristic of *this* measure, is to show more tenderness to *those* feelings, than *can* be shown by the taxes to which it is proposed to substitute it.

Objection XI. The property of the nation would thus be *swallowed* up in the Exchequer.

Answer: No more than by taxes to the same amount.

Objection XII. It would be a *subversion* of the ancient law of inheritance in this country.

Answer: A *quiet* alteration, made by a mere *extension* given to the *old* law — to a branch more ancient than almost any of those at the expense of which it is extended. No *subversion*, except in as far as every *amendment* is a *subversion*.

Objection XIII. It would be an *innovation*.

Answer: No more than every *new* law; nor, as we have seen, so *much* as most new laws: no more than a set of taxes to the same amount.

Not so much; for all the revenue laws we have, are *innovations* in comparison with the law of *escheat*.

SECTION VIII.

EXISTING LAW.

CAN anything of *harshness* be imputed to the proposed measure? Not when viewed by itself, we have seen already. View it, then, in comparison: turn to existing law. No exclusion of the father *here* as *there* on pretence of the *ponderosity* of inheritances: no exclusion of the half-blood, as if the son of my father or my mother were a stranger to me: no exclusion of all children but the first born, as if the first born only lived upon food, and all others upon air: no exclusion of the better half of the species, as if the tender sex had no need of sustenance. The feelings of individuals — sole elements of public happiness — these, and these only, are the considerations that have *here* been exclusively consulted, and their suggestions undeviatingly adhered to; — human feelings, the only true standards of right and wrong in the business of legislation, not lawyers' quibbles, nor reasons of other times, that have vanished with the times.

Pursue the comparison yet farther: on the one hand, no harshness at all, as we have seen; on the other, a harshness which is incurable. The proposed law, taking nature for its guide, leads expectation by a silken string: the existing law, pursuing the ghosts of departed reasons, thwarts expectation at every step, and can never cease to do so. It does so, because it is in the *speechless* shape of *common* law; and it would do so still, even though *words* were given to it, and it were converted into statute law. Reasons rooted in utility, are so many anchors by which a law fastens itself into the memory: lawyers' quibbles are a rope of sand, which neither has tenacity of its own, nor can give stability to anything else. Rules and quibbles together, the impression they make upon the mind is that of the wind upon the waves; and when incidents spring up to call them into action, the sensation produced is the sensation of a thunder-stroke.

SECTION IX.

ANCIENT LAW.

SHALL we dig into antiquity? The result will be still more favourable. Reckoning from the subversion of the Roman empire, property, considered as surviving to the proprietor, is comparatively of modern date. Under the feudal system, in the morning of its days estates greater than life estates were unknown; the most fixed of all possessions fell back into the common stock upon the death of the possessor; and before the reign of the Conqueror was at an end, the feudal tree, transplanted from the continent into this our island, had covered almost the whole surface of the kingdom with its gloomy shade. This venerable system had, indeed, before that period, lost a good deal of its vigour, which is the same thing as to say its rigour; and the principle of succession had taken root under it, but not without being loaded with conditions, and weakened by defalcations and distortions, over and above those which have been already glanced at, and which we are plagued with to this day. The relaxation, too, was an innovation, which, in the vocabulary of antiquarian idolatry, as well as of indiscriminating timidity, means a corruption of the primeval state of things.

At a much later period, moveable property took, if not exactly the same course with immoveable, a course more opposite to that indicated by utility, and equally repugnant to that which seems prescribed by nature. The more substantial part — the immoveable — had been reserved for the maw of feudal anarchy: the lighter part — the moveable — was carried off by some holy personage for *pious uses;* and of all uses, the most pious was his own. Moveable and immoveable together, power without mercy, or imposture without shame, took the whole under their charge; the claims of the widow and the orphan were as little regarded as those of the most distant relative. So late even as the latter part of the reign of Edward III.* it required an exertion of parliamentary power to make the man of God disgorge, in favour of the fatherless and the widow.†

The right of bequest, the right of governing property by one who is no longer in existence to enjoy it, is an innovation still more modern. In its relation to moveables, it was conquered from the spiritual power by gradual and un-

* 31 Edward III. parl. 1, ch. ii. 9, co. 40, in Burn's Eccl. Law, iv. 197.

† Hume has fallen into a mistake on this subject, in supposing that in the reign of Henry II. moveables were the prey, not of the spiritual power but the temporal. "It appears," says he, vol. i. anno 1100, "from Glanville, the famous justiciary of Henry II., that in his time, where any man died intestate, an accident which must have been frequent when the art of writing was so little known, the king, or the lord of the fief, pretended to seize all the moveables, and to exclude every heir, even the children of the deceased, — a sure mark of a tyrannical and arbitrary government."

So far Hume, referring to Glanville, I. vi. c. 16. But what Hume understands of intestates in general, Glanville confines to bastards.

definable encroachments: the validity of its exercise having, from the conquest to the present time, depended on the decision of that same power, which, till the above-mentioned statute of Edward III. was interested in denying it: and after the right was secured, the facility of its exercise must for a long time have been confined within narrow bounds by the scarcity of literary acquirements. In its relation to immoveables, it was not placed on solid ground till the statute of Henry VIII., and then only by implication: nor (to take the matter in the words of Blackstone) was it "till even after the restoration, that the power of devising real property became so universal as at present."*

All this while, the law of escheat, coeval with the reign of the Conqueror, dwelt upon as a subject of importance in the reign of Henry II.,† touched upon by a numerous series of statutes reaching down as low as Edward VI., recognised by decisions of so recent a period as the late reign,‡ exists in indisputable vigour; although the facility of tracing out heirs in these times of universal and instantaneous communication, added to the want of an administrative establishment, adapted to the collection of such a branch of revenue, prevent it from being noticed in its present state in the account-book of finance.

SECTION X.

BLACKSTONE.

Is *opinion* worth resorting to? A poor warrant, after the *fiat* of utility written in characters so legible. In morals, in politics, in legislation, the *table of human feelings* is, I must confess, to me what the Alkoran was to the good Mussulman: opinions, if unconformable to it, are false — if conformable, useless. Not so to many a worthy mind: for their satisfaction, then, even this muddy source of argument shall not remain unexplored. Shall Blackstone, then, be our oracle? Blackstone, the most revered of oracles, though the latest? From him we have full licence—from him we have a latitude outstretching, and that even to extravagance, the utmost extent which either humanity or policy would permit us to assume. But let us hear him in his own words: —

Blackst. Comment. II. 12. "Wills, therefore," says he, "and testaments, rights of inheritance, and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does anything vary more than the right of inheritance under different national establishments. In England, particularly, this diversity is carried to such a length, *as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state.*" — "In personal estates, the father may succeed to his children; in landed property, he can never be their immediate heir, by any the remotest possibility; in general, only the eldest son, in some places only the youngest, in others, all the sons together, have a right to succeed to the inheritance: in real estates, males are preferred to females, and the eldest male will usually exclude the rest: in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed."

Thus far our Apollo. Legatees, we see, are nothing to him; he sacrifices parents to us, and even children; he sees not that children are not only *expectants*, but *co-occupants*.

No sympathy for disappointed expectation— no feeling for beggared opulence — no regard for meritorious service — no compassion for repulsive infirmity, obliged to forego assistance, or to borrow it of selfish hope. The law, his idol, has no bowels: why should we? The rights of legatees, the rights of children, are mere creatures of the law; as if the rights of occupants were anything more. Of wills, or even succession, he knows no use but to prevent a scramble.

The business of succession is a theatre which the laws of nations have pitched upon, as it were, in concert, for the exhibition of caprice; none with greater felicity than the law of England. She has her views in this, and they are always wise ones: — to insult the subject, to show him what arbitrary power is, and to teach him to respect it.

"This one consideration," continues he, "may help to remove the scruples of many *well-meaning* persons, who set up a *mistaken* conscience in opposition to the rules of law. If a man *disinherits his son* by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as *contrary to natural justice;* while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* witnesses instead of *three*, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devise. But both of them *certainly proceed upon very erroneous principles;* as if, on the one hand, the son had by *nature* a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his decease. Whereas, the *law of nature* suggests, that on the death

* II. Comment. ch. i. † Glanville, I. vii. c. 17.
‡ [George II.] Atkyn's Reports.

of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society."

"The right of inheritance," says he but two pages before, "or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view, that it has *nature* on its side,* yet we often *mistake* for *nature*, what we find established by long and inveterate *custom*."† It is certainly a wise and effectual, but clearly a political establishment,‡ since the *permanent* right of property,§ vested in the ancestor himself, was no *natural* but merely a *civil* right.‖

What we learn from all this is, that so long as a man can find a pretence for getting rid of the phrase, "*contrary to natural justice*," there is no harm in his children's being left by him to starve; and that those who would make a "*conscience*" of leaving their children thus to starve, are "*well-meaning*" but "*mistaken*" people. Quere, who is this same Queen "*Nature*," who makes such stuff under the name of laws? Quere, in what year of her own, or anybody else's reign, did she make it? and in what shop is a copy of it to be bought, that it may be burnt by the hands of the common hangman, and her majesty well disciplined at the cart's tail?

It being supposed, in point of *fact*, that the children have or have not a right of the sort in question given them by the *law*, the only rational question remaining is, whether, in point of *utility*, such a right *ought* to be given them or not? To talk of a *law of nature*, giving them or not giving them a *natural right*, is so much sheer nonsense, answering neither the one question nor the other.

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* Quere, what is "nature?"

† Quere, the difference between "*nature*" here and "*custom?*"

‡ Quere, what "*establishments*" are there in the world besides *political* ones? Quere, what signifies whether a "*political establishment*" be a "*natural*" one or no, so long as it is a "*wise and effectual one?*"

§ If an "*impermanent*" right be a "*natural*" one, quere, at what o'clock does it cease to be so? If it be *natural* a right of property should *commence*, how comes it to be *unnatural* it should *continue?*

‖ Quere, what signifies whether it was a "*natural right*" or no. Quere, what sort of a thing is a "*natural right*," and where does the *maker* live, particularly in *Atheist's town*, where they are most rife?

TAX WITH MONOPOLY;

OR

HINTS OF CERTAIN CASES

IN WHICH,

IN ALLEVIATION OF THE BURDEN OF TAXATION, EXCLUSIVE PRIVILEGES MAY BE GIVEN AS AGAINST FUTURE COMPETITORS, WITHOUT PRODUCING ANY OF THE ILL EFFECTS, WHICH IN MOST CASES ARE INSEPARABLE FROM EVERYTHING THAT SAVOURS OF MONOPOLY;

EXEMPLIFIED IN THE INSTANCES OF THE

STOCK-BROKING AND BANKING BUSINESSES.

TAXES on the profits of traders would, generally speaking, be impracticable: —

1. The difficulty of ascertaining the profit and loss upon each article would be an endless source of evasion.

2. The measures necessary to be taken against evasion, would be an equally endless source of real or supposed oppression.

3. The disclosure of the secrets of the trade would operate as a prohibition of ingenuity and improvement.

I. STOCK-BROKERS.

In the business of a stock-broker, none of these objections have place: —

1. & 2. No difficulty about ascertaining profit and loss: loss, none in any case: rate of profit perfectly fixed: the transactions which gave birth to it are always upon record.

3. No secret, no inventions, no improvement in the case.

II. BANKERS.

1. 2. & 3. No more difficulty about ascertaining profit and loss, nor anything more of invention than in the case of stock-brokers.

The profit of the banker results from the placing out at interest, in large sums, what he finds to spare, out of the money he receives in large and small sums, on condition of returning it as it is wanted.

If in this case there be any such thing as a *secret*, the disclosure of which might be attended with prejudice to anybody, it lies in the money transactions of the *customers*, who deposit the money and draw for it, and of those who, by getting bills discounted or otherwise, deal with this shop in the character of borrowers. Were the knowledge of these transactions generally spread, or were it easily attainable, it might in some instances be attended with prejudice to the parties, by the information given to *rivals* in business, or other *adversaries*. But, for the purpose in question, the knowledge in question might be confined in each instance to a *single accountant* appointed by the crown, whose attention would be confined to the mere *figures* having neither time to inquire, nor interest in inquiring, into the *history* of any transaction, in the occasion of which this or that sum was drawn for or deposited.

So much for the *tax* — the *burthen*. Now as to the *exclusive privilege* — the *compensation*. The effects to which this sort of institution, in as far as it is mischievous, stands indebted for its mischievousness, are —

1. Enhancement of the price of the article dealt in.

2. Impairing the quality.

3. Lessening consumption, in the case of consumable goods: — or more generally, diminishing the general mass of benefit depending upon this use of the sort of article, whatever it may be.

4. Enhancement of trouble to the customer, by his having farther to go than if dealers were more numerous.

5. [The exclusion of persons already embarked in the business, a still greater grievance, if it existed, is out of the question here.]

None of these ill effects would take place in any degree, in the instance of either of the above professions. Thus, in the case of

1. *The Stock Broker.*

1. The price of the service rendered is a fixed per centage; it is amply sufficient: enhancement might be prevented by law.

2. The quality of the service cannot, from

the nature of it, either be improved or impaired: neither skill nor invention, nor so much as any extraordinary degree of exertion, have anything to do with it.

3. The demand for this sort of service cannot in the nature of things, be lessened, or anyways affected, by the limitation of the number of the persons whose profession it is to render it, or by the fixation of the price at which they are to render it.

4. The distance between the agent and his employer cannot receive any enhancement from the exclusive privilege, or from anything else. The agents, how numerous soever, are confined to a spot by the very nature of their business.

II. *The Banker.*

1. The service of receiving and keeping—the service rendered to the *depositor* of money, is rendered *gratis*, and though the number of bankers should ever be lessened, there can be no apprehension of their requiring payment for this service.

The price at which the other sort of customer, the *borrower*, is supplied, is equally incapable of being raised by the operation; the rate of interest will depend upon the quantity of capital accumulated in the whole country, not upon the quantity that happens to be in the hands of bankers. A confederacy, and that a successful one, among all the bankers, town and country, to raise the rate of interest, is in itself scarce possible; besides that the rate is actually limited by law.

2. The *quality* of the service is as little susceptible of being *impaired* by such a cause: it is more likely to be improved: each bank being rendered richer, and thereby safer, in proportion as the number is kept down.

3. As little is the demand for this sort of service capable of being lessened by the restriction of the number of hands allowed to render it: the demand for the service, consisting in the *keeping* of money, will depend upon the quantity of money to be kept: the demand for the service consisting in the *loan* of money, will depend upon the quantity of money wanted for a time by those who have value to give for it when the time is over. In neither of these instances has the demand anything to do with the number of the persons whose business it is to render this sort of service.

4. The distance between the professional man and his customer and employer need not receive any enhancement in that case, any more than in the other. Distance has never been a matter much regarded in this branch of business. As to the *London* bankers, instead of *spreading* themselves equally within the circle of the metropolis, their object seems rather to have been to crowd *into*, or as *near* as possible to, Lombard Street.

In the country, whatever distance the depositor and borrower have been used to go, they might contrive to go, were it necessary, without *much* inconvenience. The inconvenience might be done away entirely by proper reservation, adapted to future demands in places where as yet there is none.

A calculation might easily be made of the progressive value of the indemnity, from retrospective view of the gradual increase in the number of bankers on the one hand, and in the quantity of circulating cash and paper deposited on the other.

The advantages of monopoly find their way without much difficulty to the eyes of dealers.*

Monopoly would be no innovation in this branch of business; an illustrious example is afforded by the bank of England.

Should the principle be approved of, it might be worth while to look over the list of trades, professions, and other lucrative occupations, for the purpose of ascertaining the instances in which this species of compensation might be given, without any such inconvenience as would outweigh the benefit.

The exclusive privilege being a benefit, ought of course to be coupled with the tax in every instance where it is not attended by a preponderant mass of inconvenience to the public at large.

The stock of these cases being exhausted, then, and not till then, may be the time to look out for the instances, if any, in which the tax might stand alone without the indemnity to lighten it.

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* Not long ago a great banking-house opened upon the plan of giving 3 per cent. for money on condition of its not being drawn out till after a short notice. This was too much, and so it proved: but an indication seems to be afforded that, even without the benefit of the monopoly, the profits of trade are capable of bearing a deduction in this instance.

END OF VOLUME II.